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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 16.

LOUIS KANN, SIGMUND KANN, AND MYER COHEN, APPELLANTS,

vs.

CAROLINE KING.

No. 17.

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED MARCH 16, 1905.

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(19,668 & 19,669.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 202.

LOUIS KANN, SIGMUND KANN, AND MYER COHEN, APPELLANTS,

vs.

CAROLINE KING.

No. 203.

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING.

APPEALS FROM THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

LOUIS KANN ET AL., Appellants,
vs.
CAROLINE KING. } No. 1456.

and

HENRY RANDALL WEBB, Executor, &c., Appellant,
vs.
CAROLINE KING. } No. 1457.

a Supreme Court of the District of Columbia.

CAROLINE KING, Complainant,
vs.
MARIANNE A. B. KENNEDY, MEYER COHEN, Sigmund Kann, Louis Kann, Henry Randall Webb, and Maria Gillis Dewey, Defendants. } No. 22834. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Original Bill.*

Filed December 4, 1901.

In the Supreme Court of the District of Columbia.

CAROLINE KING, Complainant,
versus
MARIANNE A. B. KENNEDY, MEYER COHEN, Sigmund Kann, and Louis Kann, Defendants. } No. 22834, Eq. Doc.

Bill of complaint.

To the supreme court of the District of Columbia, holding an equity court for said District:

The complainant shows to the court as follows:

1. She is a resident of the city of Washington, in the District of Columbia, and sues in her own right.

2. The defendants Marianne A. B. Kennedy and Meyer Cohen are residents of the said city and District, the defendants Sigmund Kann and Louis Kann are residents of the city of Baltimore in the State of Maryland, and all of said defendants are sued in their own right as hereinafter shown.

3. Heretofore, to wit, on the eighth day of July, A. D. 1890, by her indenture of lease of the said date, the defendant Marianne A. B. Kennedy, being then the owner in fee-simple and in severalty of premises No. 715 Market space in the said city of Washington, demised the same to the late Henry King, Junior, the husband of the complainant, for a term of three (3) years from and next after the first day of October, 1890, to which said term, by covenants between the said parties thereto, certain extensions were added, extending the said term, in the aggregate, for ten (10) additional years, with the option to the lessee of a five (5) year further extension, or until the first day of October 1908, upon the several terms and conditions set forth in the said lease and the said extensions thereof, all of which will more fully appear by reference to a copy of the said lease and the said extensions herewith filed, marked "Exhibit A," and prayed to be read as part of this bill as though in terms set forth herein, one of which provisions or stipulations was that the lessee, his executors, administrators or assigns, should pay or cause to be paid in each and every year of the term the taxes general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government, and should pay a rental of twenty-four hundred ($2400.00) dollars per annum for the said premises throughout the said term, in equal monthly instalments of two hundred ($200.00) dollars each, payable on the last day of each and every month, during its continuance, and the further provision that, if the said lessee, his executors, administrators or assigns, should at any time or times refuse, neglect or fail well and truly to observe, keep and perform the conditions and every of them of the said lease according to their or its true intend and meaning, then, at the option or election of the said lessor, the aforesaid term and every unexpired part thereof should instantly cease and determine, and at the like option of the said lessor it should be lawful for her into and upon the said demised premises and into and upon any and every part thereof wholly to re-enter and the same to have again, repossess and enjoy as in her first and former estate as fully as though the said demise had never been made.

4. Thereafter, to wit on the fifteenth (15) day of August, A. D. 1897, the said lessee, Henry King, Junior, departed this life leaving a last will and testament which was duly admitted to probate and record, and letters of administration *cum testamento annexo* issued to Harry King, who, thereafter, to wit, on the 26th day of August, A. D. 1897, for a valuable consideration, assigned and transferred to the complainant the said lease of the said premises, with the consent in writing of the defendant Marianne A. B. Kennedy.

5. The said Henry King, Junior, during his life, and the complainant since his death, have fully and faithfully complied with each and every of the terms of the said lease with the single exception that, wholly through oversight and inadvertence, and
2 in part occasioned by the affliction and mental distress suffered by the complainant in consequence of the death of her said husband, added to the perplexity and distraction caused by the unfortunate condition in which his business affairs were found to be after his death, the instalment of the taxes due upon the said property for the second half of the fiscal year ending June 30th, 1898, and payable in the month of May of that year, *were* overlooked and left unpaid. With the exception of that instalment, all the taxes due upon the said property down to the present time have been fully paid by her said husband in his lifetime and by herself after his death, and each and every of the stipulations of the said lease have been fully complied with, as above stated.

6. Thereafter, to wit, on the 13th day of April, A. D. 1899, an alleged sale of the said property for the said unpaid instalment of taxes was at-empted to be made by the municipal authorities, and a pretended purchase hereof was made by one C. H. Wiltsie, of Rochester, in the State of New York, who is, and for some years has been, largely engaged in the business of making such pretended or attempted purchases of property in the District of Columbia at tax sales, and a certificate of said alleged purchase was issued to him by one E. G. Davis, collector of taxes for the District of Columbia, a copy of which certificate is hereto annexed, marked "Exhibit B," from which said certificate, as will be seen by reference to the said exhibit, which is prayed to be read as part hereof, it appears that the said sale purported to be made of the said property for the sum of one hundred and forty-three dollars and eighty-three cents ($143.83), the said property itself being worth a large sum of money, to wit, not less than fifty thousand ($50,000.00) dollars. The said alleged tax sale and the issue of the said certificate thereof was wholly unknown to the complainant, nor had she any knowledge of any of the said proceedings, nor did she discover the fact that the said above-described instalment of taxes had been overlooked and not paid by her until thereafter, to wit, in the latter — of the month of July, A. D. 1901, more than two (2) years after the date of the said alleged sale, and after the time within which, under the laws in force in the District of Columbia, the said property could be redeemed from the said tax sale, if the same had been a valid proceeding.

7. In the said month of July, A. D. 1901, the complainant received a letter purporting to be signed by the said C. H. Wiltsie and bearing date July 24th, 1901, calling the complainant's attention to the said alleged sale, and proposing to surrender the tax certificate "upon a very reasonable basis," if the complainant should give the matter her immediate attention, to which letter the complainant replied immediately, stating her willingness to

pay a reasonable amount for the redemption of the same. Thereupon the said Wiltsie demanded as the condition of redemption repayment to him of the said one hundred and forty-three dollars and eighty-three cents ($143.83), an alleged recorder's fee of ten cents, interest upon the said amount at the rate of fifteen (15%) per cent.
3 per annum, and one hundred ($100.00) dollars additional, more than one hundred (100%) per cent. upon the amount of his outlay. Considering this demand excessive, and being advised that these tax sales were capable of being avoided, certain negotiations between the complainant and the said Wiltsie ensued, until September 24th, 1901, when the said Wiltsie, through his representative, sent the said tax certificate to the Central national bank in the said city of Washington, to be surrendered to the complainant upon the payment of the said original sum with interest at fifteen (15%) per cent. per annum and a bonus of seventy-five ($75.00) dollars, making a total of two hundred and seventy-two dollars and ninety cents ($272.90), being still nearly double the amount of his outlay. The complainant, though as aforesaid advised that the said alleged tax proceeding was invalid and incapable of enforcement, offered to repay to the said Wiltsie the said original outlay with interest at fifteen (15%) per cent. per annum and a bonus of fifty ($50.00) dollars, and the said matter was pending in this condition at the time of the occurrences hereinafter set forth.

8. Some time in the month of September, 1901, one Charles H. Knight, an attorney and specialist in the matter of taxes and tax sales, having learned of the said pretended tax sale above set forth, communicated the fact thereof to the defendants, Sigmund Kann and Louis Kann, who were and are merchants carrying on among other branches of trade, under the firm name of "S. Kann, Sons & Co.," the same business as that in which the complainant is engaged upon her said leased property, namely, the business of millinery and cloaks, the premises occupied by the said defendants Kann in their said rival or competing business being situated upon each side of the premises of the complainant, and they have for some time been desirous of acquiring the premises so occupied by the complainant for their own convenience. The said Charles H. Knight, as complainant is informed and believes, and therefore avers, communicated with the said defendants Kann upon the subject, under the mistaken impression that they were owners or occupants of complainant's premises No. 715 Market space, and advised them that the said tax sale was irregular and illegal and could be avoided. The defendants Kann, however, as the complainant if further informed and believes and therefore avers, informed the said Knight that they were not the owners or occupants of the said property and referred him to the defendant Marianne A. B. Kennedy as the owner thereof. Thereupon, as the complainant is further informed and believes, and therefore avers, the said Knight called upon H. Randall Webb, Esquire, who was the attorney and agent of the said defendant

Marianne A. B. Kennedy, and gave to him the like information, whereupon the said Webb communicated the fact of the complainant's inadvertent omission to pay the said tax and the consequent attempted tax-sale proceedings following to the defendant, Marianne A. B. Kennedy, and informed her that she might pursue either of two courses, namely, to inform this complainant of the omission and permit her to comply with her contract obli-
4 gation in the matter, or to treat her said inadvertence as a forfeiture of the lease, and thereupon to lease the said premises to the defendants Kann, who she knew to be desirous of obtaining the same and who were willing to pay a larger rental than that reserved in the lease, the rental value of the said premises having somewhat increased since the time said lease was entered into. Thereupon, as complainant is further advised and believes and therefore avers, the said Webb, acting under what he understood to be the wish and instructions of his said client, the defendant Marianne A. B. Kennedy, called upon the defendant Meyer Cohen, who was the attorney and agent of the defendants Kann, and inquired whether said defendants were still willing to take a lease of complainant's said premises at a rental of three hundred ($300.00) dollars per month, as they had some time previously signified their willingness to do, and the said defendant Cohen, after a conference with the defendants Kann, who had knowledge of the fact that complainant held a lease for said premises as aforesaid, replied that they would take such a lease provided they could be put into possession of the said premises. At a conference held between the said defendant Cohen and the said defendants Kann over a proposal that the said Cohen in his own name, but in reality as the agent of the said Kanns, should purchase of the said Wiltsie the said tax title and hold the same, and thereby be in a position the better to aid in enforcing the forfeiture of the complainant's lease for the benefit of the said Kanns, the latter told the former that they had doubts whether it would be right for them to buy the tax title, but that if he, the said defendant Cohen, purchased it, they, the said defendants Kann, would stand by him in the transaction; the said Cohen then called upon the said Webb to inform him that he was going on to Rochester to buy the tax title from the said Wiltsie, and added that he, the said defendant Cohen, "was going to buy it at arm's length" from the said Webb and any interest that he represented, to which the said Webb replied "I don't know about that;" whereupon the said defendant Cohen proceeded upon his journey, his said action in so doing being entirely acquiesced in by the said Webb, acting on behalf of the said Kennedy, no effort being made either by her or him to prevent the acquisition of a title, colorably or otherwise, adverse to her and destructive of her own interests. At this time, the certificate of the tax sale had been forwarded by the said Wiltsie to the Central National Bank of Washington, and was lying there, awaiting redemption by the complainant, and the slightest notice by the defendant Marianne A. B. Kennedy or her representative to

the complainant of the errand on which the said defendant Cohen was going, or of the enterprise upon which the said defendant Kann were embarking, would have enabled her at once to purchase the said tax certificate and to prevent the attempted or contemplated action of the said defendant Cohen or of the said defendants Kann, had such action been desired by the defendant Marianne A. B. Kennedy. The complainant is further advised and believes and therefore avers, that it never was contemplated upon the part of either the defendants Marianne A. B. Kennedy or the defendants Kann that the said tax certificate should be purchased for the purpose of using the same adversely to her or in any manner to endanger her title to the very valuable property in question, that an agreement or understanding, whether expressed or tacit, existed between them that the said tax title should be used only in furtherance of the common design to have the complainant's lease forfeited by reason of her inadvertent omission to pay the single instalment of tax in question, and thereupon to dispossess her and to have the defendants Kann enter upon and take possession of her said premises as tenant of the said defendant Marianne A. B. Kennedy, at an increased rental. The defendant Cohen, as the complainant is informed and believes and therefore avers, has since declared that he doubted the propriety of the purchase of the said tax certificate, and that, upon his said journey to Rochester for the purpose, his doubts upon the said subject rendered him unable to sleep, but that because of the alleged attitude of the complainant's son towards the defendants Kann in a former transaction, he thought he might properly proceed to purchase the tax title for the said defendants Kann, hold it, and afterwards determine what they could or should do with it. Upon his arrival in Rochester, he found that the said tax certificate was deposited in the Central national bank in Washington pursuant to the negotiation for its redemption between the complainant and the said Wiltsie, whereupon said defendant Cohen made to the said Wiltsie or his representatives an offer for the said tax title of such a character that the said Wiltsie immediately telephoned to the said Central national bank to ascertain whether the complainant had exercised her right to redeem or purchase the said tax certificate, and finding this had not been done he countermanded by telephone her right to do so and sold the said tax certificate to the said defendant Cohen, who bought the same for the benefit and as agent for the said Kanns with funds furnished him by them for such purpose and at a price, which he has refused to disclose to complainant and of which she is ignorant. This was on the first day of October, and on the third day of October, only two days later, the said project of purchase had been so expeditiously pursued that the defendant Cohen returned from Rochester to Washington, the said tax certificate was converted into a tax deed, conveying the said real estate to the said Cohen executed with the formalities of execution by the Commissioners of the District of Columbia completed, and the tax deed recorded on the said

third day of October, 1901. A copy of said deed marked Exhibit B No. 2 is herewith filed and prayed to be read as part hereof at any hearing of this cause.

9. On the last day of September, 1901, the complainant, pursuant to the terms of the lease and her custom, sent the monthly instalment of rent then due to the defendant Marianne A. B. Kennedy in ignorance of the aforesaid project to enforce a forfeiture against her and to embarrass her right to be relieved against the same, by having an apparent third party acquire a title to the property through the said tax proceedings, and she was greatly surprised thereafter,
6 to wit, on the second day of October, 1901, to receive notice from the defendant Marianne A. B. Kennedy that she would not receive the said rent, and that she proposed to treat the lease as forfeited and determined by reason of the omission to pay the second instalment of taxes which fell due in the month of May, 1898. Complainant herewith filed, marked "Exhibit C," the said communication from the defendant Marianne A. B. Kennedy, prepared as she is advised and believes by or under the direction of the attorney of the said defendant, and which letter, prayed to be read as part hereof, as will be seen from examination thereof, wholly omits to advise or inform the complainant of the said contemplated purchase of the tax certificate. Nevertheless, upon receipt of the said letter, the complainant immediately sent her representative in this behalf, to the Central national bank proposing to yield to the excessive demand made of her in that regard, and to redeem the same, when she found that her right to do so had been countermanded as above set forth. Thereupon the complainant by her counsel called upon the said Webb, as the agent and attorney of the complainant Kennedy to ascertain what had become of the tax certificate so recalled, whereupon the said Webb said that neither he nor the said Kennedy had purchased the same but that perhaps the said Cohen had bought it. On the fifteenth day of October the complainant through her counsel, further inquired of the said Webb whether he had taken or would take and steps to redeem or purchase said tax title from said Cohen, whereupon said Webb said that he had taken no steps nor made any efforts so to do, but that hereafter they would take the tax title up; that in said interview complainant's counsel inquired of said Webb whether said Cohen had demanded possession of the property from Mrs. Kennedy or would sue her in ejectment for it, to which said Webb laughingly replied "No, there is no danger of that."

The complainant is informed and believes and therefore avers, that now, however, the defendants claim that an agreement existed between them to the effect that if the defendant Kennedy will by all means in her power enforce the said forfeiture, and if she succeeds therein, lease the said premises to said defendants, Kann, the latter will not seek to enforce the tax title against her, but that if she shall not so insist upon the said forfeiture, then the defendants Kann will set up an adverse title against her.

On the fourth day of October, 1901, the complainant, by her counsel, having learned that the defendant Myer Cohen had obtained the tax title to the said property, called upon the said defendant and inquired what terms could be arrived at between them for the redemption or purchase of the same, then and there offering to reimburse him whatever he had paid for the same, including all of his expenses and reasonable compensation for the time he had expended in his purchase, to which he replied that he had not decided what he would do with the said tax title, and, to the statement made by the complainant's counsel that the said defendant was not in the habit of purchasing tax titles, and that he had no
7 interest in the property either as owner or mortgagee, and to the inquiry as to his purpose in the matter, he replied, "You know I have for the last five or six years been seeking to get this property for the Kanns; I bought this tax deed thinking it might help me to force the Kings to give up their lease, knowing I could easily make a lease with Mrs. Kennedy." To complainant's inquiry through her counsel, as to the price paid for the tax deed, by the said defendant, he declined to reply, except to say that the complainant might submit an offer and that he would consider such an offer if submitted. To complainant's further statement, through her said counsel that said defendant must expect litigation, he answered that he did expect it.

11. On October 8th, 1901, the complainant, through her counsel stated to the defendant Marianne A. B. Kennedy the invalidity of the said tax-sale proceedings, that the failure to pay the tax was simply an oversight, which was being remedied at the time the notice of refusal to accept the rent was received, and asked that she might be allowed the necessary use of the said defendant Marianne A. B. Kennedy's name in proceedings to cancel said tax sale, offering to pay all cost of such proceeding, and to indemnify and protect the defendant Marianne A. B. Kennedy by a proper bond or undertaking against any liability or loss in the premises, to which proposal said defendant, through her counsel, answered under date of October 10th, declining the said proposition, on the ground that said defendant could not place the protection of her title in the hands of the complainant or permit the use of her name in any proceedings by the latter. In reply, under date of October 12th the complainant, through her said counsel, proposed that the defendant Marianne A. B. Kennedy might herself institute the necessary proceedings to cancel the tax sale, the complainant offering to pay all the costs of the proceedings, and to furnish counsel to act in conjunction with the said defendant's counsel, paying the reasonable fees of both, and again offering to indemnify the defendant Marianne A. B. Kennedy against all cost of such proceeding and against all *cost of such proceeding and against all* risk or damage from the said alleged tax sale, furnishing such sureties as might be required of her, to which proposal the defendant Marianne A. B. Kennedy, by her counsel, again replied under date of October 14th, rejecting the

same and claiming the other taxes on parts of the property had not been paid, namely, on parts of it for the whole of the year ending June 30th, 1898, for one-half of the year ending June 30th, 1900, and for the whole of the year ending June 30th, 1901. A copy of the said correspondence is herewith filed, marked "Exhibits D. E. F. and G" and prayed to be read as a part of this bill, the originals of which exhibits, as also of all other exhibits to this bill, the complainant is ready to produce at any hearing of this cause.

With respect to the alleged default in the payment of other taxes upon parts of the property in question, mentioned in Exhibit G, the complainant says that the said taxes therein referred to have
8 never been considered or treated by the parties hereto as covered by the lease, being for two parcels of land, one of which has an area of one hundred and seventeen (117) square feet and the other of which has an area of sixteen (16) square feet, separated from each other. The taxes upon the said fragmentary and disconnected parcels of land have always been paid by the defendant Marianne A. B. Kennedy herself, and never by this complainant or by her late husband. The fact that the said taxes were allowed to fall into arrears by the defendant herself illustrates that inadvertence and oversight in the payment of taxes is liable to befall others than the complainant.

12. Thereafter, the defendant Marianne A. B. Kennedy becoming more fully informed or advised as to the transaction, was unwilling to proceed further with it; and, through Doctor Henry D. Fry, a relative with whom she had consulted about the matter, she informed this complainant that she did not consider it desirable or proper to insist upon the forfeiture, and that she was willing to waive the same and to permit the complainant to continue under the terms of the lease, if such arrangement could be effected.

13. On the 30th day of October, A. D. 1901, the said Doctor Henry D. Fry, acting as a representative of the defendant Marianne A. B. Kennedy, and at her instance and request, stated to the defendant Cohen, and to additional counsel employed on behalf of the defendants Kann, the attitude of the defendant Marianne A. B. Kennedy in the matter, and her wish to withdraw from the present scheme of enforcing the forfeiture and of dispossessing the complainant under the circumstances, in favor of the defendants Kann; whereupon the said defendants Kann, through their said counsel, replied that the defendant Marianne A. B. Kennedy must take her choice between fighting the complainant by insisting upon the forfeiture and pursuing the requisite proceeding for dispossessing her, or else that she must fight the defendants Kann for the title to her property, which might be wholly lost to her through their tax deed.

14. Thereafter, to wit, on the ninth (9) day of November, A. D. 1901, the defendant Marianne A. B. Kennedy, under the pressure and menance thus brought to bear upon her, instituted a landlord and tenant proceeding against the complainant for the possession of the said premises, a copy of the summons in which case is hereto

annexed, marked " Exhibit H," and prayed to be read as part hereof, the trial under the said proceeding is fixed for Thursday the 5th day of December, A. D. 1901, at two (2) o'clock, p. m. before L. C. Strider, a justice of the peace for the District of Columbia.

15. The complainant is advised and believes, and therefore avers, that the proceedings for the sale of the property covered by her lease for default in the payment of the second instalment of taxes for the year ending June 30th, 1898 are wholly and radically irregular, defective, illegal and void. Among the many ommissions to comply with the necessary legal prerequisites to a valid sale, under the laws in force in the District of Columbia, of property for the default in the payment of taxes, and under which laws the said alleged sale was attempted to be made, are the following:

9 (*a.*) The statute requires that the property should be assessed " in the name of the owner, or trustee, or trustees of the owner thereof," and that the advertisement of sale should be in the name of the person against whom assessed. The property in controversy was assessed and advertised in the name of Maria T. Gillis, whereas the defendant Marianne A. B. Kennedy is, and for the last twenty-five (25) years has been, the owner thereof in fee-simple, and in severalty.

(*b.*) The statute requires that the collector of taxes shall, within twenty (20) days after the last day of sale, file with the recorder of deeds a written report in which he shall give a statement of the property sold. The only report if any tax sale made in the year 1899 is recorded in Liber 2391, at folio 411, of the land records of the District of Columbia, and is made, not by the collector of taxes, but by John B. Wight, John W. Ross and Lansing H. Beach, Commissioners of the District of Columbia, which report however, does not embrace any sale of the property described in this bill, a fragmentary entry is made in Liber 2419, folio 222, in which the property in controversy is referred to, but unaccompanied by any certificate of any character, a further fragmentary entry appears in Liber 2436. If these fragmentary entries can in any manner be connected together so as to make a valid, legal report as required by the statute, which is not conceded, still the said report is irregular for the following particulars, namely:—

(*c.*) The statute requires that the said report shall state the taxes due upon the said property, whereas the said report fails to state such taxes.

(*d.*) The said statute further requires that the said report shall state the amount paid for the said property at such tax sale, whereas the said report omits to state the amount so paid.

(*e.*) The statute requires said report to set forth the date of the said sale, whereas the said report omits to state such date or any date of the said sale.

(*f.*) The statute requires the said report to set forth the cost of the sale, whereas the said report does not purport even to set forth the said costs.

(*g*.) The statute further requires that the said report shall state to whom the said property is sold, which requirement, also, the said report fails and omits to do sufficiently, if at all.

(*h*.) The statute further provides that every purchaser at such sale, other than the District of Columbia, shall pay the amount of his bid to the said collector within five days after the last day of sale; the last day of said alleged sale was April 19th, 1899, and the amount of the bid for said property should have been paid to the said collector on or before the 24th day of April, whereas the alleged purchaser did not pay the amount bid by him until the 8th day of May following.

16. By reason of the said several irregularities, defects and failures to comply with the plain requirements of the statute, the complainant is advised and believes and therefore avers, that the said tax sale, the tax certificate issued pursuant thereto, and the tax deed to the defendant Cohen are without legal validity or effect, and that the same are wholly insufficient in law to deprive the complainant of her right in this court to seek relief against the forfeiture of valuable interests under the said lease, under the circumstances hereinbefore set forth. And the complainant is further advised and believes, and therefore avers, that, even independently of the said irregularities and defects in the said tax proceedings, the manner of the acquisition of the said tax deed and the circumstances attending the same are, of themselves, of such a character as to render it contrary to equity and good conscience that the said tax title should be allowed to be set up for the purpose of hindering, embarrassing and defeating the complainant's right in a court of equity to seek relief against the attempt to enforce the said forfeiture, under the circumstances aforesaid.

The complainant avers that, as hereinbefore set forth, before any steps were begun by the defendant Cohen or the defendants Kann to acquire the said tax title, they were informed by and through the said Charles H. Knight that the said tax sale was invalid because of the failure to advertise the same in the name of the owner as required by the statute; and she avers that the only conceivable object or purpose of the said defendants in seeking to acquire the said tax title, with express notice of its said invalidity, after consultation with and through the agency of a competent legal adviser, was to deprive the complainant of her right in equity, or to embarrass her in the exercise of that right, to be relieved against the contract forfeiture of her term, through her wholly innocent oversight in the payment of the inconsiderable tax in question, by presenting as an obstacle to such relief against her lesser, the fact that the tax could no longer be paid to the municipal authorities, but had ripened into a *prima facie* valid title in a stranger. The complainant is advised and believes, and therefore avers, that such a title, acquired under such circumstances and for such a purpose, ought not to be, and will not be allowed to be set up for the said purpose or for any other. The said tax title, however, stands as a cloud upon the title of the com-

plainant, and as hereinbefore set forth, is being used as a menace to the defendant Marianne A. B. Kennedy to prevent her from waiving the said contract forfeiture, and allowing her and the complainant to adjust the matter amicably, without resort to the courts.

Wherefore, and because she is without adequate remedy at law, the complainant prays to the court as follows:

1. That Marianne A. B. Kennedy, Meyer Cohen, Sigmund Kann and Louis Kann be served with process, made parties defendant hereto and required to answer the exigency of this bill, answer under oath being hereby expressly waived.

2. That the complainant may, by order and decree of this honorable court, be relieved against any forfeiture or attempted forfeiture of her lease by reason of her omission to pay the second semi-annual instalment of taxes for the fiscal year ending June 30th, 1898, she hereby tendering herself willing and ready to pay into the registry of the court or otherwise such sum of money as shall be
11 fully adequate and sufficient to discharge the said taxes with any lawful accumulation of interest, penalties or other additions thereto, together with any other items of cost or expenditure connected therewith or arising therefrom, which, under the judgment of the court, it may be equitable and proper for her to pay.

3. That, by a restraining order or injunction *pendente lite* during the pendency of this suit, and by permanent injunction at the final hearing thereof, the defendant Marianne A. B. Kennedy may be restrained and enjoined from proceeding to dispossess the complainant of her said term, by means of the said landlord and tenant proceeding instituted by her against the complainant before Justice of the Peace L. C. Strider, hereinbefore referred to, or by any other means or proceedure whatsoever.

4. That the attempted tax sale of the property in controversy the certificate of sale issued pursuant thereto, and the tax deed to defendant Meyer Cohen may by decree of this honorable court be declared to be null and void and decreed to be delivered up to be cancelled, and that the cloud upon the complainant's title to or interest in the said property created by the said proceedings, certificate and deed may be removed.

5. That the defendants Meyer Cohen, Sigmund Kann and Louis Kann may, by restraining order or injunction *pendente lite* during the pendency of this suit and by permanent injunction at the final hearing thereof, be restrained and enjoined from setting up any title or claim to the said property, or instituting any proceeding to recover the same, as against this complainant, under and by virtue of the said attempted tax sale, and the certificate of sale and tax deed issued thereunder.

6. That the complainant may have such other and further relief as the nature of the case may require and to the court may seem proper.

The defendants to this bill are Marianne A. B. Kennedy, Myer Cohen, Sigmund Kann, Louis Kann.

CAROLINE KING.

J. J. DARLINGTON,
LEON TOBRINER,
For Compl'ts.

I, Caroline King on my oath do depose and say that I have heard read the foregoing bill of complaint by me subscribed and know the contents thereof; that the statements therein made from my personal knowledge are true, and those stated upon information and belief, I believe to be true.

CAROLINE KING.

Subscribed and sworn to before me this 29th day of November A. D. 1901.

ELLIS HUGHES,
Notary Public, D. C.

[Endorsed:] 22,834.

12 EXHIBITS.

Filed December 4, 1901. J. R. Young, Clerk.

EXHIBIT "A."

This indenture made this eighth day of July in the year of our Lord eighteen hundred and ninety, between Marianne A. B. Kennedy of the city of Washington in the District of Columbia, of the first part, and Henry King Jr. of the same place, of the second part, witnesseth.

That for and in consideration of the rents and covenants hereinafter reserved and contained, the said party of the first part has let and demised, and by these premises does let and demise, unto the said party of the second part, that certain messuage, situate on Market space, that is to say, on the north side of Louisiana avenue, between Seventh and Eighth streets, northwest, in the aforesaid city of Washington, and numbered "715," together with all and singular the store fixtures and other fixtures now in and about said messuage and belonging or pertaining thereto, as the property of the said party of the first part, and together, also, with the ground on which said messuage stands and all its appurtenances thereto belonging, or in anywise appertaining, for a term of *three years* from and next after the first day of October, eighteen hundred and ninety, upon the following and upon each of the following conditions, that is to say, upon condition—

First. That the rent hereinafter reserved and every instalment thereof, shall be punctually and promptly paid to the said party of

the first part and her assigns in the manner and at the time or times hereinafter mentioned for the payment thereof.

Secondly. Upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will use and occupy the store part or portion of said messuage as, and only as, a fancy or dry-goods store, and the remaining part or portion of said messuage, either as and for a dwelling-house or as and for offices.

Thirdly. Upon condition that the said party of the second part his executors, administrators or assigns, shall not, during the continuance of the aforesaid term, either assign or sublet the said demised premises or any part thereof, without first obtaining the consent in writing, of the said party of the first part to such assignment or sublease.

Fourthly. Upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will, at his or their cost and expense, keep the said demised premises and every part thereof, in good repair and condition, excepting only such repairs as may be rendered necessary by accidental fire.

Fifthly. Upon condition that the said party of the second
13 part, his executors, administrators or assigns, will, during the continuance and until the end and determination of the said term, for which the said premises are demised, pay or cause to be paid in each and every year thereof the taxes general and special of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government.

Sixthly. Upon condition that, at the expiration or other sooner determination of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will peaceably and quietly yield up and surrender to the said party of the first part, her heirs or assigns, the said demised premises and every part thereof, in good condition and repair, excepting only reasonable wear and tear and such repairs as may be rendered necessary by accidental fire as aforesaid; and,

Seventhly. Upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors, or assigns, shall and will pay to the said party of the first part, an annual rent of twenty-four hundred dollars ($2400.) for the aforesaid demised premises, in and by equal monthly instalments of two hundred dollars ($200.) each, on the last day of each and every month during the continuance of the aforesaid term; and subject to the aforegoing conditions, and each of them.

To have and to hold the said demised premises unto the said party of the second part for the term of three years from and next after the first day of October 1890, as aforesaid.

And the said party of the second part, having accepted, and now again accepting the said demised premises for the term aforesaid,

upon the conditions and every of them hereinbefore mentioned and set forth doth, by these presents, for himself, his executors, administrators and assigns, covenant, promise and agree to and with the said party of the first part, that he, the said party of the second part, shall and will well and truly observe, keep, obey, and perform the aforesaid conditions and every of them, according to their and its true intent and meaning; and further,

That if he, the said party of the second part, his executors, administrators, or assigns, shall at any time or times refuse, neglect or fail well and truly to observe, keep and obey and perform the aforesaid conditions and every of them, according to their or its true intent and meaning, then at the option or election of the said party of the first part, the aforesaid term and every unexpired part thereof, shall instantly cease and determine (anything herein contained to the contrary notwithstanding), and be thereafter utterly null and of no effect; and it shall thereupon, at her option and election, be lawful for the said party of the first part into and upon the said demised premises, and into and upon any and every part thereof, wholly to re-enter and the same to have again, repossess and enjoy, as in her first and former estate, as fully as though said demise had never been made.

In testimony whereof the said parties hereto, have respect-
14 ively hereunto set their hands and seals on the day and year first hereinbefore written.

(Signed) MARIANNE A. B. KENNEDY. [SEAL.]
(Signed) H. KING, JR. [SEAL.]

Witness:

MYER COHEN.

DISTRICT OF COLUMBIA, *ss:*

I, Myer Cohen a notary public in and for the District aforesaid, do hereby certify that Marianna A. B. Kennedy and H. King, Jr., parties to a certain lease, bearing date on the eighth day of July A. D. 1890, and hereunto annexed, personally appeared before me in the District aforesaid, the said Marianne A. B. Kennedy and H. King, Jr., being personally well known to me to be the persons who executed the said lease, and acknowledged the same to be their act and deed.

Given under my hand and notarial seal this eighth day of July A. D. 1890.

(Signed) MYER COHEN,
Notary Public.

By mutual consent this lease is herewith extended from the date of its expiration for a further term of five years, subject to all the

conditions herein mentioned and that Mr. King is to pay the taxes on said leased property during the term.

Dec. 27, '92.

(Signed) MARIANNE A. B. KENNEDY. [SEAL.]
(Signed) H. KING, JR. [SEAL.]

Witness:
S. WOLF.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me the said Marianne A. B. Kennedy and H. King Jr. and acknowledged the foregoing renewal to be their act and deed.

Given under my hand and notarial seal this twenty-ninth day of December A. D. 1892.

[SEAL.] ADOLPH G. WOLF,
Notary Public.

By mutual consent the term of the foregoing annexed lease is herewith extended from the date of the expiration of the foregoing extension of the said lease for a further term of five years, subject to the other conditions before mentioned, and the further condition that the lessee H. King Jr. shall pay the taxes on the said leased property during the term hereby created, and it is further agreed that the said lessee, at the expiration of the term hereby created, shall have the privilege of extending the within lease for an additional term of five years.

15 In witness whereof we have hereunto set our hands and affixed our seals this eighth day of October, 1896.

MARIANNE A. B. KENNEDY. [SEAL.]
HENRY KING, JR. [SEAL.]

Witness:
ADOLPH G. WOLF.

DISTRICT OF COLUMBIA, *ss:*

I Adolph G. Wolf, a notary public in and for the District aforesaid, do hereby certify that Marianne A. B. Kennedy and H. King Jr. parties to a certain extension of lease bearing date on the eighth day of October 1896, and hereunto annexed, personally appeared before me in the District aforesaid, the said Marianne A. B. Kennedy and H. King Jr. being personally well known to me to be the persons who executed the said extension of lease and acknowledged the same to be their act and deed.

Given under my hand and notarial seal this eighth day of October, 1896.

(Signed) ADOLPH G. WOLF,
Notary Public.

AUG. 26, 1897.

In consideration of the sum of one dollar and the assumption of the covenants of this lease, and for other valuable considerations, I, Harry King, administrator of Henry King Jr. deceased, do hereby sell, assign and transfer to Caroline King, all my *my* and all the right, title and interest of said Henry King Jr. in, to and under the foregoing lease from M. A. Kennedy.

Witness my hand and seal at Washington, D. C.

(Signed) HARRY KING, [SEAL.]
Administrator c. t. a. Est. of Henry King, Jr.

I hereby consent to the foregoing transfer and assignment.

(Signed) MARIANNE A. B. KENNEDY.

(Endorsed:) Lease Assignment of lease M. A. Kennedy & Henry King Jr. 9.29 a. m. Received for record October 17, 1896 and recorded in Liber 2146 folio 287 *et seq.* of the land records of the Dist. of Col. C. H. J. Taylor, recorder.

EXHIBIT "B."

Office of the collector of taxes of the District of Columbia.

WASHINGTON, *April* 13, 1899.

This is to certify that under the direction of the Commissioners of the District of Columbia, there has this thirteenth (13) day of April, one thousand eight hundred and ninety nine, been sold at public auction, at the office of the collector of taxes for said District, in pursuance of a public notice or advertisement duly published
16 and in accordance with the provisions of an act of Congress entitled "An act in relation to taxes and tax sales in the District of Columbia" approved February 28th, 1898, subject, however, to redemption within two years from said sale, the following-described property, viz: sublot A and imp. in square numbered 432, assessed in the name of Maria T. Gillis for taxes levied and in arrears on the first day of July, A. D. 1898, penalties interests and costs as follows, to wit:

Taxes due the District of Columbia for fiscal year ending June 30, 1898	$128.50
Penalties thereon	14.13
Advertisement	1.20
Total	$143.83

Amounting in all to one hundred and forty three and eighty-three hundredths dollars ($143.83) and that C. H. Wiltsie being the

highest bidder, became the purchaser thereof. The receipt of the above taxes, penalties and costs of sale is hereby acknowledged.

This certificate is issued subject to the payment of all arrears of taxes before the issue of deed.

Witness my hand and the seal of the District of Columbia this 25th day of April, 1899.

E. G. DAVIS,
Collector of Taxes, District of Columbia.

Witness:
H. BINGHAM.

[Seal of District of Columbia.]

Endorsed.

Certificate of sale for taxes by the Commissioners of the District of Columbia, April 13, 1899, sublot A and imp., square numbered four hundred and thirty two, assessed in the name of Maria A. Gillis, sold to C. H. Wiltsie.

Amount paid at sale	143.83
Fee for recording	.10
	143.93

For value received, I hereby assign and transfer all my right, title and interest in the within certificate to Myer Cohen.

C. H. WILTSIE.

Witness:
J. M. JAMIESON,
Collector of Taxes, District of Columbia.

OCT. 3, '01.

Tax-sale record shows that lot A square 432 sold April 13, 1899, in name of Maria A. Gilis has not been redeemed.

E. G. DAVIS,
Collector of Taxes, D. C.

17 EXHIBIT B No. 2.

This indenture made this third day of October in the year of our Lord nineteen hundred and one by and between Henry B. F. Macfarland, John W. Ross and Lansing H. Beach, Commissioners of the District of Columbia, of the first part, and Myer Cohen of the second part, witnesseth:

Whereas, in compliance with law sublot numbered A and the improvements thereon in square numbered four hundred and thirty-two in —— of —— District of Columbia was duly assessed for tax-

ation in the name of Maria T. Gillis for the fiscal years hereinafter mentioned and the taxes herein named duly levied thereon.

And whereas, the said taxes, together with the penalties and costs accruing thereon, being unpaid, and the said property in arrears for the same, the collector of taxes for the District of Columbia duly published said described property in a pamphlet, as required by law giving due notice thereof by advertisement.

And whereas the said collector did on the thirteenth day of April 1899, the day named for the sale of said property in arrears, offer for sale, and sell the same to C. H. Wiltsie the highest bidder therefor, at and for the sum of one hundred and forty-three and eighty-three-hundredths ($143.83) dollars, that being the highest sum bid for said described property, and said amount being sufficient to meet the taxes, penalties and costs due thereon; the said sublot in said square being sold to satisfy taxes, penalties and costs due thereon as follows:

Amount of tax due the District of Columbia for the support of the government thereof for the fiscal year ending June 30, 1898, one hundred and twenty-eight and fifty-hundredths ($128.50) dollars penalties accruing thereon fourteen dollars and thirteen (13) cents ($14.13).

Costs accruing thereon one dollar and twenty cents ($1.20)

Amounting in all to the sum of one hundred and forty-three dollars and eighty-three cents (143.83)

And whereas immediately after said sale to said C. H. Wiltsie and upon payment by him of the purchase-money, the said collector of taxes duly issued a certificate of sale to said C. H. Wiltsie.

And whereas the said C. H. Wiltsie has duly assigned the said certificate of sale and all his right, title and interest thereunder to the said Myer Cohen, party of the second part, as is evidenced by his assignment duly endorsed on said certificate.

And whereas more than two years have elapsed since said sale, and the said property has not been redeemed as provided by law, the said party of the second part has become entitled to a conveyance of the premises from the parties of the first part.

Now therefore this indenture witnesseth that the said parties of the first part by virtue of the authority conferred on them by law and for and in consideration of the premises and the sum of one dollar lawful money of the United States to them in hand paid the
18 receipt of which is hereby acknowledged, have granted, bargained and sold and conveyed and by these presents do grant, bargain, sell and convey unto the said party of the second part, his heirs and assigns, all the said hereinbefore-described sublot of ground and premises, and the appurtenances thereunto belonging or in anywise appertaining; to have and to hold the same unto the said party of the second part, his heirs and assigns forever.

In witness whereof the said Henry B. F. Macfarland, John W. Ross and Lansing H. Beach, Commissioners of the District of Colum-

bia and parties of the first part have hereunto set their hands and affixed their seal- on the day and year first hereinbefore written.

HENRY B. F. MACFARLAND, [SEAL.]
JOHN W. ROSS, [SEAL.]
LANSING H. BEACH, [SEAL.]
Commissioners of the District of Columbia.

Signed, sealed and delivered in the presence of
WILLIAM TINDALL.

DISTRICT OF COLUMBIA, *ss:*

Be it remembered that on this third day of October nineteen hundred and one before the subscriber, a notary public in and for the District aforesaid, personally appeared H. B. F. Macfarland, John W. Ross and Lansing H. Beach, Commissioners of the District of Columbia, and parties of the first part to the foregoing instrument of writing, who are by me personally known to be the persons who executed the foregoing instrument, and acknowledged the same to be their act and deed as such Commissioners, and that they had signed, sealed and delivered the same for the purpose and use in said instrument expressed.

In testimony whereof I have hereunto set my hand and affixed my notarial seal this third day of October nineteen hundred and one.

WILLIAM TINDALL.
[NOTARIAL SEAL.] *Notary Public.*

Endorsed on cover: 65 Recorder of deeds, Dist. of Col. Oct. 3, 1901. Deed Henry B. F. Macfarland John W. Ross and Lansing H. Beach Commissioners of the D. of C. to Myer Cohen Sublot *a* and impts. square 432 of — D. C. Received for record on the 3 day of October 1901 3.40 p. m. and recorded in Liber No. — folio No. — one of the land records for the D. of C. —— —— recorder.

EXHIBIT C.

1630 R. I. AVE., *Oct.* 1*st*, 1901.

To Mrs. H. King, Jr.:

I have only learned within the last few days, that you have forfeited your lease of premises 715 Market space by neglecting to pay the taxes, and allowing the property to be twice sold at tax sales.

19 The lease being thus vitiated and by advice of my attorney I must decline receiving any further rental from you.

For fuller explanation of my action in the matter, I refer you to Wm. H. Randall Webb.

M. A. B. KENNEDY.

EXHIBIT "D."

WASHINGTON, D. C., *October* 8, 1901.

Mrs. Marianne A. B. Kennedy, # 1630 Rhode Island Ave. N. W., city.

MY DEAR MADAM: Mrs. Caroline King has handed us your letter of the 1st inst., as also notice of the 4th inst. advising her that you considered the lease for premises # 715 Market space, this city, forfeited to you by her failure to pay a certain tax thereon (for the fiscal year ending June 30, 1898). We are informed that Mr. Harry King, representing his mother, upon the receipt of your letter of October 1st, called upon you for the purpose of explaining the matter to you and that you refused to see him. We assume that you are aware that your tenant has always paid the taxes upon the demised premises, and the failure to pay the one made the basis of the notice was an oversight, caused by the death of Mr. Henry King, Jr., which was being remedied at the time your notice was received.

We have advised Mrs. King that the sale of the premises for taxes is void. She is desirous of paying the tax and complying with the terms of the lease, having paid every tax assessed against the property, both before and since the one overlooked.

WASHINGTON, D. C.

Mrs. M. A. B. K. No. 2:

For the purpose of cancelling the alleged tax sale and complying with the conditions of the lease, Mrs. King asks permission to use your name in instituting and conducting legal proceedings to that end, hereby offering to pay all costs of such proceedings and to indemnify and protect you by proper bond or undertaking, against any liability or loss in the premises.

Will you be kind enough to advise us by Saturday, the 12th inst., what you will do in the matter.

Very respectfully,

(Signed) J. J. DARLINGTON.
LEON TOBRINER.

EXHIBIT "E."

Henry Randall Webb, attorney and counsellor at law, Columbian building.

WASHINGTON, D. C., *Oct.* 10, 1901.

Messrs. J. J. Darlington & Leon Tobriner.

DEAR SIR-: My client Mrs. Marianne A. B. Kennedy has handed me your letter of the 8th instant with reference to the notice
20 to Mrs. Caroline King to give up possession of premsses No. 715 Market space. From the information in my possession,

I am compelled to say that you are in error as to the tenant having always paid the taxes, but that on the contrary default has repeatedly been made, endangering the title to the property. By reason of one of these defaults, a tax deed has been issued by the District authorities, which sets up a hostile title to that of my client.

I trust that you are right in your opinion that it is invalid, but my client cannot consent to place the protection of her title in the hands of Mrs. King or permit the use of her name in any proceedings by Mrs. King.

My client further instructs me to say that the repeated defaults of the tenant culminating in this hostile tax deed render it imperative that she should insist upon the termination of the lease and her resumption of possession of the property.

I beg to advise you that I am and have been for some time the counsel of Mrs. Kennedy, who is a very aged woman, and I have to request that any future communications with reference to her business be addressed to me. I am also authorized by Mrs. Kennedy to appear for her in judicial proceedings and therefore request that should you see fit to institute any, you will communicate with me instead of having process served upon her.

I am very respectfully yours,

(Signed) H. RANDALL WEBB.

EXHIBIT "F."

WASHINGTON, D. C., *October* 12, 1901.

Henry Randall Webb, Esq., Columbian building, city.

MY DEAR SIR: We have yours of the 10th inst., in reply to our letter of the 8th instant to Mrs. Marianne A. B. Kennedy.

On behalf of our client, Mrs. Caroline King, we are authorized to make the following proposition to Mrs. Kennedy. If Mrs. Kennedy is desirous of relieving her property from the alleged tax sale, and will institute proceedings for that purpose, Mrs. King will advance, and pay all the costs of such proceeding and furnish counsel to act in conjunction with counsel for Mrs. Kennedy whose reasonable fees will also be paid by Mrs. King. She further agrees to indemnify and protect Mrs. Kennedy from all costs of such a proceeding, as also all risk or damage from said alleged tax sale, furnishing such security as may be required by her.

As to your request that any future communications with reference to Mrs. Kennedy's business be addressed to you, and that in any proposed litigation process be served upon you as her attorney, we suggest that we are perfectly willing to comply with this request; but inasmuch as Mrs. Kennedy is a woman of advanced years, in a question of notice and serving of process which may hereafter become material, it might be well for your own as well as for our protection that you have Mrs. Kennedy advise us that
21 you are authorized to accept all notices to her and service of

process against her. This we think will leave the way clear for us to communicate with you solely in the matter.

Very respectfully,

(Signed) J. J. DARLINGTON.
LEON TOBRINER.

EXHIBIT "G."

OCTOBER 14, 1901.

Messrs. J. J. Darlington, Leon Tobriner.

DEAR SIRS: I have this morning your letter of the 12th instant and I here enclose to you a letter from Mrs. Kennedy which confirms my letter of the 10th instant to you as to my authority to represent Mrs. Kennedy and to accept service of process for her.

With reference to the proposition submitted by your letter, I have this to say. That in my opinion Mrs. King, under the covenants in the lease, is already liable in damages to Mrs. Kennedy for all expense she may be put to in the effort to extinguish the tax title on the premises arising through the breach of that covenant, and in the event of the tax title being sustained and Mrs. Kennedy ultimately losing the property, the covenantor will be liable for the full fee-simple value of the premises. I do not consider therefore that your proposition involves anything on the part of the covenantor to which the covenantor is not already bound.

With the knowledge which I now have of the conduct of the lessee in this matter and the utter disregard shown of the interests of my client when the present situation could have been averted, I think it would be most unwise for my client to abdicate the protection of her own title in favor of a person who has proved so faithless to the important obligations contained in the lease.

My client is, of course, most anxious to defeat if possible the tax title and I will gladly accept aid for that purpose from any source, and if your clients have any information which would aid her I consider they are under moral and legal obligations to impart it to me without delay. I could not, however, in consideration of such aid or under any circumstances consent to any arrangement which would waive the forfeiture of the lease or in anywise affect the right of my client to resume possession of the property.

I think it proper to advise you that the other taxes on parts of this property for the whole of the year ending June 30th, 1898, for one-half of the year ending June 30th, 1900, and for the whole of the year ending June 30th, 1901, which your clients also failed to pay, have been paid by me today.

Yours truly,

(Signed) HENRY RANDALL WEBB.

WASHINGTON, D. C., *October* 14*th*, 1901.

Messrs. J. J. Darlington, Leon Tobriner.

DEAR SIRS: I beg to advise you that my counsel, Mr. Henry Randall Webb, is authorized by me to accept service of process and to
22 appear for and represent me in any litigation affecting my interests in the premises No. 715 Market space this city, which may be instituted, particularly any proceedings relating to the dispossession of the present tenant, the forfeiture of the lease of said premises and the recent tax title which the lessee has suffered to arise by failure to pay the taxes as covenanted in the lease.

Yours truly,

(Signed) MARIANNE A. B. KENNEDY.

EXHIBIT "H."

MARIANNE A. B. KENNEDY, Complainant,
vs.
CAROLINE KING, Defendant.
} No. —. (Copy.)

To Luke C. Strider, justice of the peace for the District of Columbia:

Your complainant, Marianne A. B. Kennedy, respectfully represents that she is entitled to the possession of the tenement and premises known as number seven hundred and fifteen Market space, in the city of Washington, District of Columbia, and that the same is detained from her and held without right by Caroline King, who was the tenant of your complainant, and whose tenancy and estate therein have been lawfully determined, as provided in the agreement under which said tenancy was established, and by the service of a lawful notice to quit said premises.

Complainant thereef prays that a summons may be issued to a proper officer of said District, to be served upon the said tenant holding over as aforesaid, commanding said tenant to appear before you on a day to be therein named to show cause why judgment in favor of your complainant for the possession of said tenement and premises, and costs accruing upon this application, should not be rendered herein, agreeably to the act of Congress in such cases made and provided.

(Signed) MARIANNE A. B. KENNEDY,
Complainant.

Subscribed and sworn to before me this 9th day of November, 1901.

RUTLEDGE WILLSON,
Notary Public, D. C.

[NOTARY'S SEAL.]

H. RANDALL WEBB,
Counsel for Marianne A. B. Kennedy.

Summons.

DISTRICT OF COLUMBIA, *ss:*

The President of the United States to W. H. H. Gould or any qualified constable in and for the District aforesaid, Greeting:

Whereas Marianne A. B. Kennedy has made to me the foregoing and annexed written complaint on oath representing that she
23 is entitled to the tenement and premises in the said complaint described, and that the same is detained from her and held without right by Caroline King, the defendant herein, after defendant's tenancy and estate therein has determined, as in said complaint set forth.

You are therefore commanded to summon the said defendant to appear before me, the subscriber, on the nineteenth day of November A. D. 1901, at 10 o'clock a. m. at my office, No. 916 "F" street, northwest, in the city of Washington, District of Columbia, to answer the said complaint, hereto, annexed, and show cause, if any, why judgment should not be rendered for complainant for the possession of the said tenement and premises and costs of suit.

Witness my hand and seal this 9th day of November, A. D. 1901.

LUKE C. STRIDER, *J. P.* [SEAL.]

(Endorsed:) 22834 Eq. Copy exhibits for Wolf & Cohen.

Issued December 4, 1901.

KING, Complainant, vs. KENNEDY ET AL. } No. 22834. Equity.

Restraining Order.

Upon the complainant filing undertaking as required by equity rule 42.

The defendant Marianne A. B. Kennedy is hereby restrained as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the 13th day of December 1901, of which take notice.

By the court,—

A. B. HAGNER, *Justice.*

Injunction Undertaking.

Filed December 4, 1901.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

CAROLINE KING, Complainant,
vs.
M. A. B. KENNEDY ET ALS., Defendants. } No. 22834, Equity Docket 51.

Caroline King, the complainant, and Harry King, surety, hereby undertake to make good to the defendant all damages by him suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the justice shall direct, and that, on dissolving the injunction, he may give
24 judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction.

CAROLINE KING.
HARRY KING.

Approved: December 3d. 1901.
A. B. HAGNER, *Justice.*

Bill of Revivor.

Filed March 7, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING, Complainant,
versus
MARIANNE A. B. KENNEDY ET AL., Defendants. } No. 22834. Equity.

Bill of revivor.

To the supreme court of the District of Columbia, holding an equity court for said District:

Your complainant, Caroline King, shows to the court as follows:
1. Heretofore, to wit, on the 4th day of December, A. D. 1901, your complainant filed herein her bill of complaint against Marianne A. B. Kennedy, Myer Cohen, Sigmund Kann and Louis Kann, praying that the said Marianne A. B. Kennedy might be enjoined from prosecuting a certain landlord and tenant proceeding to recover possession of premises numbered 715 Market space, in the

city of Washington, in the District of Columbia, and for relief against a tax deed obtained by the defendant Cohen from the District of Columbia for the benefit of the defendants Kann, attempting to convey sublot "A" in square 432, otherwise known as No. 715 Market space, pursuant to an alleged but wholly invalid sale for taxes thereon which your complainant had inadvertently permitted to fall into arrears, and for relief against an attempted forfeiture of the complainant's lease of the said premises by reason of her said inadvertent omission to pay an instalment of the said taxes, all of which will more fully appear by reference to the said original bill the averments contained in which are made part of this bill of revivor, and prayed to be read as — thereof.

2. Thereafter, to wit: on the 4th day of December, 1901, a restraining order issued from this court directed to the defendant Marianne A. B. Kennedy, returnable on the 13th day of December 1901, and all of the defendants appeared by counsel in this cause and acknowledged service of the several writs of process issued therein.

3. Before said cause came on for hearing under the restraining order, and before any of the defendants had answered the bill, to wit: on the 4th day of December, 1901, the defendant Marianne A. B. Kennedy departed this life, leaving a last will and testament bearing date the 7th day of July, 1896, and a codicil thereto bearing date July 12th, 1898, both duly executed to pass real estate in the District
25 of Columbia, wherein she devised to Henry Randall Webb made party defendant hereto, all her estate, real, personal and mixed, the said devise comprising the said premises No. 715 Market space, in the city of Washington, in trust to sell the same, and, out of the proceeds thereof, to pay certain legacies amounting in the aggregate, exclusive of lapsed and revoked legacies, as the complainant is informed and believes, and therefore avers, to about $40,000, and making no other disposition of her said property and estate or any part thereof, her said estate, as the complainant is informed and believes, and therefore avers, very largely exceeding in value the amount of the said legacies, and, in default of a residuary devise, bequest or other disposition of the surplus, descending to Maria Gillis Dewey, also made party defendant hereto, the said Maria Gillis Dewey being the sole heir-at-law and next of kin of said testatrix, as the complainant upon information and belief avers. The said will and codicil were thereafter, to wit: on the 17th day of January, A. D. 1902, duly admitted to probate and record as a will of real and personal property, in the probate court of the said District; and the complainant is advised that her said suit, and the proceedings thereunder, in so far as concerns the said Marianne A. B. Kennedy, have been abated by her death.

4. The said Henry Randall Webb, executor of the said last will and testament as aforesaid, has notified your complainant that he claims to be entitled to possession of said premises No. 715 Market space, under the terms of the said will, and that it is his purpose at once to prosecute proceedings against your complainant to recover

possession of the same under the notice to quit given her by the said Marianne A. B. Kennedy in her lifetime, as set forth in the original bill herein. Your complainant is advised however, that it is a doubtful question in law whether the said Henry Randall Webb is entitled to possession of the said property under the terms of the said will, or is simply entitled to make sale of the said premises for the purpose of the trusts specified therein, leaving the defendant Maria Gillis Dewey, the heir of the said testatrix, entitled to possession thereof; that the said Maria Gillis Dewey, furthermore, upon payment by her of the several legacies in the said will and codicil contained, is entitled to terminate all right, title, interest and estate of the said Henry Randall Webb in and to the said premises in controversy; that, whether the said Maria Gillis Dewey is entitled to possession of the said premises until sale thereof by the said Henry Randall Webb or whether she shall terminate the interest and estate of the said Webb as above indicated or not, she is nevertheless a party materially interested in the questions litigated in this cause, and a necessary party thereto, and that she is, further, a necessary party hereto in order to relieve the complainant of liability to a multiplicity of suits in respect to her application to be relieved against the forfeiture sought to be asserted against her as set forth in her said original bill.

5. Your complainant is informed and believes, and therefore avers, that the said Henry Randall Webb, unless enjoined and restrained by this honorable court, will institute the said proceedings
26 by him threatened as above set forth for the ejection of the complainant from her possession of her said premises, and that, as above shown, the complainant will be liable to have a similar proceeding instituted against her by the defendant Maria Gillis Dewey, for the same purpose and based upon the same grounds, should she elect so to do. As she is advised and believes and therefore avers, she is entitled to have this cause and proceeding revived against the said Henry Randall Webb, executor as aforesaid, and against the said Maria Gillis Dewey, and to have the same put in the same plight and condition as they were in prior to the abatement thereof by the death of the said Marianne A. B. Kennedy.

To the end, therefore, that the said Henry Randall Webb, the said Maria Gillis Dewey, the defendants Myer Cohen, Sigmund Kann and Louis Kann may answer the premises, and that the said original bill and this suit and proceeding may stand revived as against the said Webb and the said Maria Gillis Dewey, and be in the same state and condition as the same were in at the time of the death of the said Marianne A. B. Kennedy, your complainant prays:

1. That the said Henry Randall Webb and Maria Gillis Dewey may be made parties defendant hereto, served with process, and required to appear and answer in the premises, and to show cause, if any they have, why this cause and the proceedings therein had should not stand and be revived against them and each of them,

and be in the same plight and condition as the same were in at the time of the abatement thereof.

2. That, by a restraining order or injunction *pendente lite* during the pendency of this suit, and by permanent injunction at the final hearing thereof, the defendant Henry Randall Webb may be restrained and enjoined from proceeding in the attempt to dispossess the complainant of her said term by means of a landlord and tenant proceeding against her as threatened by him, or by any other means or procedure whatsoever, and that the complainant may, by appropriate orders and proceedings in the cause, be protected from the like attempts by any other of the defendants during the pendency of this suit.

3. And that your complainant may have such other and further relief as the nature of the case may require.

CAROLINE KING.

DISTRICT OF COLUMBIA, *ss*:

I, Caroline King on oath say that I have read the foregoing bill by me subscribed and know the contents thereof, that the allegations therein contained as of my own personal knowledge are true, and that those set forth upon information and belief I believe to be true.

CAROLINE KING.

Subscribed and sworn to before me this 7th day of March, A. D. 1902.

JOHN SCRIVENER,
[SEAL.] *Notary Public, D. C.*

27 [Endorsed:] No. 22,834 Equity Caroline King *v.* M. A. B. Kennedy *et al.* Bill of revivor Copy For Mr. Johnson.

Supplemental Bill of Complaint.

Filed April 4, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

To the honorable the justice of said court:

Your complainant Caroline King, shows to the court as follows:

1. That heretofore, to wit, on the fourth day of December A. D. 1901, your complainant filed herein a bill of complaint against Marianne A. B. Kennedy, Myer Cohen, Sigmund Kann and Louis Kann, praying that the said Marianne A. B. Kennedy might be en-

joined from prosecuting a certain landlord and tenant proceeding to recover possession of the premises numbered seven hundred and fifteen (715) Market space, in the city of Washington, District of Columbia, and for relief against a tax deed obtained by the defendant Cohen from the District of Columbia for the benefit of the defendants Kann.

2. That thereafter, to wit, on the fourth day of December, A. D. 1901, a restraining order was issued from this court, directed to the said defendant Marianne A. B. Kennedy, returnable on the thirteenth (13) day of December, 1901, and all of the defendants appeared by counsel in this cause and acknowledged service of the several writs of process issued therein.

3. That thereafter your complainant avers that before said cause came on for hearing under the said restraining order, the said Marianne A. B. Kennedy departed her life in said District on the fourth day of December, A. D. 1901.

That thereafter, to wit, on the seventh day of March, A. D. 1902, your complainant filed herein her bill of revivor, averring that on the fourth day of December, A. D. 1901, the said Marianne A. B. Kennedy departed her life, leaving a last will and testament bearing date the seventh day of July 1896 and a codicil thereto bearing date July twelfth, 1898, both executed to pass real estate in the District of Columbia, wherein she devised to Henry Randall Webb, made party hereto, all her estate, real, personal and mixed, the said devise comprising the said premises seven hundred and fifteen Market space, in the city of Washington, District of Columbia, in trust, to sell the same and out of the proceeds thereof to pay certain legacies amounting in the aggregate, exclusive of lapsed and revoked legacies, as your complainant is informed and believes, to about forty thousand ($40,000.00) dollars and making no other distribution of her said property and estate, or any part thereof; her said estate very largely exceeding in value the amount of said legacies,
28 and in default of a residuary devise bequest or other disposition of the surplus descending to Marie Gillis Dewey, who is made party to these proceedings by the said bill of revivor.

4. And it is further averred and set forth in said bill, that the said last will and testament had been duly admitted to probate and record in the probate court of said District; that the said Henry Randall Webb, executor of the said last will and testament, has notified your complainant that he claims to be entitled to possession of said premises seven hundred and fifteen (715) Market space, under the terms of the said will " and that it is his purpose at once to prosecute proceedings against your complainant to recover possession of the same under the notice to quit given her by the said Marianne A. B. Kennedy in her lifetime, as set forth in the original bill herein."

5. And your complainant now avers and says that the said Henry Randall Webb in execution of his threat to prosecute proceedings against your complainant to recover possession of the said premises,

as set forth in the said bill of revivor, on the twenty-sixth (26) day of March, A. D. 1902, instituted a landlord and tenant proceeding against complainant for the possession of said premises, a copy of the complaint and summons in which cause is hereto annexed, marked Exhibit Supp. C. K. No. 1, and prayed to be read as part hereof. The trial under said proceedings is fixed for Saturday, the fifth day of April 1902, at ten (10) o'clock a. m. before Charles S. Bundy, a justice of the peace in and for subdistrict No. one, of the District of Columbia.

Your complainant therefore prays:

1. That the defendants be required to answer the premises.

2. That by a restraining order and injunction *pendente lite* during the pendency of said suit, and by a permanent injunction at the final hearing thereof, the defendant Henry Randall Webb may be restrained and enjoined from proceeding to dispossess the complainant of her said term by means of the said landlord and tenant proceedings instituted by him against your complainant before Justice of the Peace Charles S. Bundy, hereinbefore referred to, or by any other means of procedure whatsoever.

3. That your complainant may have such other and further relief as the nature of the case may require.

CAROLINE KING.

J. J. DARLINGTON,
LEON TOBRINER,
For Compl'ts.

I, Caroline King, on my oath do depose and say that I have heard read the foregoing bill of complaint by me subscribed and know the contents thereof; that the statements therein made from my personal knowledge are true, and those stated upon information and belief, I believe to be true.

CAROLINE KING.

29 Subscribed and sworn to before me this fourth day of April, A. D. 1902.

E. RICHARD SHIPP,
[SEAL.] *Notary Public, D. C.*

Endorsed: Leave given to file this bill—April 4, A. D. 1902. A. B. Hagner, justice.

EXHIBIT SUPP. C. K. No. 1.

Filed April 4, 1902.

Summons.

DISTRICT OF COLUMBIA, *Subdistrict Number* 1, } *To wit:*

The President of the United States to the U. S. marshal in and for the District of Columbia, Greeting:

Whereas, Henry Randall Webb, devisee under the will of Marianne A. B. Kennedy, deceased, has made to me written complaint on oath, representing that he is entitled to the possession of the tenement and premises known as No. 715 Market space in the city of Washington, D. C., and that the same is detained from him and held without right by Caroline King defendant herein, after defendant's tenancy and estate therein had been determined, as in the said complaint set forth.

You are therefore commanded to summon the said defendant to appear before me, the subscriber, on the 5th day of April, A. D. 1902, at 10 o'clock, a. m., at my office, No. 344 D street, N. W., Fendall building, opposite city hall, in the city of Washington, D. C., to answer the said complaint, and show cause, if any, why judgment should not be rendered for complainant for the possession of the said tenement and premises, and costs of suit.

Witness my hand and seal this 26th day of March, A. D. 1902.

CHARLES S. BUNDY, [SEAL.]
Justice of the Peace in and for Subdistrict No. 1
of the District of Columbia.

Marshal's Return.

MARCH 26, 1902.

Served by delivering a copy hereof to the tenant herein named.

AULICK PALMER,
U. S. Marshal.
B. EMERSON, *Deputy.*

30 HENRY RANDALL WEBB, Devisee under the Will of Marianne A. B. Kennedy, Deceased, Complainant,
vs.
CAROLINE KING, Defendant. } No. 452.

To Charles S. Bundy, justice of the peace for subdistrict number 1 of the District of Columbia:

Your complainant H. R. W. devisee under the will of M. A. B. K. deceased, respectfully represent- that he is entitled to the possession of the tenement and premises known as house No. 715 Market space in the city of Washington, District of Columbia, and that the same is detained from him and held without right by Caroline King who was the tenant of your complainant's testatrix and whose tenancy and estate therein has been lawfully determined as provided in the agreement under which said tenancy was established, and the service of a lawful notice to quit said premises. Complainant therefore prays that a summons may be issued to a proper officer of said District, to be served upon the said tenant holding over, as aforesaid, commanding said tenant to appear before you on a day to be therein named, to show cause why judgment in favor of your complainant for the possession of said tenement and premises, and costs accruing upon this application, should not be rendered herein, agreeably to the act of Congress in such cases made and provided.

HENRY RANDALL WEBB.

Subscribed and sworn to before me, this 26" day of March, A. D. 1902.

LUCAS P. LOVING,
Notary Public, D. C.

[SEAL.]

Issued April 4, 1902.

KING *vs.* KENNEDY. } No. 22834. Equity.

Restraining Order.

Upon the complainant filing undertaking as required by equity rule 42.

The defendant Henry Randall Webb is hereby restrained as prayed in the within-mentioned bill, until further order, to be made, if at all, after a hearing, which is fixed for the (18th) eighteenth day of April, 1902, of which take notice.

By the court:

A. B. HAGNER, *Justice.*

31 *Injunction Undertaking.*

Filed April 4, 1902.

In the Supreme Court of the District of Columbia, Holding an Equity Court.

CAROLINE KING, Complainant,
—
M. A. B. KENNEDY ET ALS., Defendants. } No. 22834.

Caroline King, the complainant, and Harry King, surety, hereby undertake to make good to the defendant all damages by him suffered or sustained by reason of wrongfully and inequitably suing out the injunction in the above-entitled cause, and stipulate that the damages may be ascertained in such manner as the justice shall direct, and that on dissolving the injunction, he may give judgment thereon against the principal and sureties for said damages in the decree itself dissolving the injunction.

CAROLINE KING.
HARRY KING.

Witness as to both parties
E. RICHARD SHIPP.

Approved: 4th April, 1902.
A. B. HAGNER, *Justice.*

Motion for Payment of Rents into Court.

Filed April 14, 1902.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

Now comes the defendant, Maria G. Dewey by Andrew Y. Bradley her solicitor, and moves the court for an order herein requiring the complainant to pay into the registry of the court all rents due, and to become due, the estate of the said Marianne A. B. Kennedy from the said Caroline King, as tenant of the premises numbered 715 Market space, Washington, D. C.

ANDREW Y. BRADLEY,
Solicitor for the Defendant Dewey.

32 *Answer of Defendant Dewey.*

Filed April 15, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

The defendant, Maria G. Dewey, to the original bill and the bill of revivor filed herein answering says:—

1. That she admits the allegations contained in paragraph one of said original bill.

2. That she admits the allegations contained in paragraph two of said original bill, in so far as they relate to the surviving defendants named therein.

3. That she admits the allegations contained in paragraph three of said original bill, in so far as they relate to the then ownership of the premises numbered 715 Market space; that having no knowledge of the remaining allegations of said paragraph she calls for strict proof thereof, in so far as they may affect her interests.

4. That having no knowledge of the allegations contained in paragraphs four to sixteen, inclusive, of said original bill she calls for strict proof thereof, in so far as they may affect her interests.

5. That she admits the allegations contained in paragraph one of said bill of revivor, in so far as they purport to recite the averments of said original bill, but having no knowledge of the allegations contained in said original bill, except as hereinbefore set forth, she calls for strict proof thereof, in so far as they may affect her interests.

6. That she admits the allegations contained in paragraph two of said bill of revivor.

7. That she admits the allegations contained in paragraph three of said bill of revivor, except in so far as they relate to her relationship to the said Marianne A. B. Kennedy, and she admits that she is the heir-at-law of the said Kennedy, but denies that she is the next of kin to the said Kennedy; that having no knowledge of the remaining allegations of said paragraph she calls for strict proof thereof, in so far as they may affect her interests.

8. That having no knowledge of the allegations contained in paragraph four of said bill of revivor she calls for strict proof thereof, in so far as they may affect her interests; that she neither admits nor denies any of the conclusions of law suggested in said paragraph, but submits her rights as heir-at-law of the said Kennedy to the judgment of the court.

9. That having no knowledge of the allegations contained in par a

graph five of the said bill of revivor, in so far as they relate to the defendant Webb, she calls for strict proof thereof, in so far as they may affect her interests.

33 And having fully answered she prays that she may be dismissed herewith, with her reasonable costs.

MARIA G. DEWEY.

ANDREW Y. BRADLEY,
Solicitor for Defendant.

STATE OF NEW YORK, } ss:
County of Kings, }

I, Maria G. Dewey, do solemnly swear that I have read the foregoing answer by *one* subscribed, and know the contents thereof; that the matters and things stated therein, on my own knowledge, are true, and those stated on information and belief, I believe to be true.

MARIA G. DEWEY.

Subscribed and sworn to before me this day seventh of April, 1902.

CHAS. H. BULKLEY,
[SEAL.] # 33, *Notary Public, Kings Co., N. Y.*

Answer of Myer Cohen.

Filed April 18, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING, Complainant,
vs.
MARIANNE A. B. KENNEDY ET AL. } In Equity. No. 22834.

The separate answer of Myer Cohen to the original bill of complaint and the bill of reviver and supplemental bill against him and others in chancery exhibited.

This defendant for answer to so much of the original bill as he is advised it is material for him to make answer, answering says:

1 and 2. This defendant admits the averments in the first and second paragraphs of said bill to be true.

3. Answering the third paragraph of said bill, this defendant says that he believes the averments of fact therein contained to be substantially true, but for the exact terms of said lease and the proper legal construction thereof, he refers to the said instrument of lease itself, as set out in Complainant's Exhibit A, with the original bill, which this defendant is advised is a correct copy of said lease.

4. Answering the fourth paragraph of said bill, this defendant is informed and believes and therefore admits the averments of fact in said paragraph to be true, except as to the consideration for the assignment of said lease, as to which he is informed and believes no consideration was paid, and as to the validity of the said assignment, as to which he is not informed.

5. Answering the fifth paragraph of said bill, this defend-
34 ant is informed and believes and therefore avers, that the averments of fact therein contained are untrue, and if material he demands strict proof thereof.

And further answering said paragraph this defendant says that he is informed and believes, and therefore avers, that neither the plaintiff nor the said Henry King during his lifetime fully and faithfully complied with the terms of said lease; but that on the contrary she and he violated the provisions thereof in many respects.

And further answering said paragraph, this defendant says that the real estate known as No. 715 Market space, embraced in the lease from the said Marianne A. B. Kennedy to the said Henry King, Junior, and by his administrator assigned to the complainant, consists of a single building fronting twenty-four feet and seventeen one-hundredths of a foot on said Market space, and running back with that width eighty-eight and fifty-eight one-hundredths of a foot; and that the ground covered by the walls of said structure comprehends the whole of sublot A, being twenty-two and seventeen one-hundredths feet front by seventy-five feet deep, the west two feet front by eighty-eight and fifty-eight one-hundredths feet deep of original lot 3, and a piece of back ground of original lot 5, twenty-two feet and seventeen one-hundredths of a foot wide by thirteen and fifty-eight one-hundredths of a foot deep, immediately in the rear of said sublot A; all which will appear by plat of survey of the said premises herewith filed and marked Exhibit Cohen No. 1.

This defendant is informed and believes, and therefore avers, that during the whole period of said lease, and until and including the taxes due and payable in the month of May, 1897, the said Marianne A. B. Kennedy paid all the taxes upon all of the land embraced in said lease, through inadvertence and mistake on her part as to the obligations of the lessee in respect of said taxes, and that neither the said Henry King, Junior, nor any one for him paid any part of the said taxes during said period. That at the time of the assignment of the said lease on the 26th day of August, 1897, the said Marianne A. B. Kennedy became advised that the lessee was under obligation to pay the taxes on said premises, and thereafter the said Marianne A. B. Kennedy paid no taxes on the said premises or any part thereof.

And this defendant is further informed and believes that thereafter, on the thirtieth day of November, 1897, the first half of the taxes for the year ending June 30th, 1898, upon the whole of said premises, became due and payable, but were not paid, but were by

the complainant suffered to become in arrear and so remained until, to wit, the thirty-first day of December, 1897, when the complainant paid so much of said tax as was assessed against said sublot A and the west two feet front of lot 3 by the depth of said sublot A, leaving the taxes for the rear portion of said ground, namely, parts of lot 3 and lot 5, unpaid. So that the same continued in arrear and unpaid. That on the thirty-first day of May, 1898, the second half of the taxes upon said sublot A and the west two feet front by the depth of lot A of said lot 3, became due and payable, and the whole of
35 the tax for the year 1898 upon the rear ground aforesaid, but none of the said taxes were paid by the complainant, and the same were suffered to be and remain in default, for which default the entire premises were sold at tax sale in April, 1899, and the said sublot A was purchased at said tax sale by one Charles H. Wiltsie. That in November of 1898, the taxes for the first half of the year ending June thirtieth, 1899 became due and payable, but no part thereof was paid, and in May of 1899, the second half of the taxes on said entire premises for the year ending June thirtieth, 1899, became due, but were not paid, and the entire taxes remained unpaid and the said premises were again sold for the said taxes and penalties in April 1900, the said sublot A being again purchased at said tax sale by the said Charles H. Wiltsie. That in November, 1899, the first half of the taxes for the year ending June thirtieth, 1900, became due and payable upon said premises, but were not paid, and in May of 1900 the second half of the taxes for said year became due and payable, but were not paid. That on the twenty-fourth of July, 1900, the complainant paid the tax for the year ending June thirtieth, 1900 together with interest and penalties thereon upon the said sublot A and the two feet front by the depth of lot A of said lot 3, leaving the residue of said taxes still due and unpaid. That the taxes for the entire year ending June thirtieth, 1901, were by law made payable in the month of May only and on the twenty-fourth day of May the complainant paid the taxes for the year ending June thirtieth, 1901 upon said sublot A and the west two feet front by the depth of lot A of said lot 3, and redeemed the same property from the tax sale made in April 1900 for the taxes due for the year ending June thirtieth, 1899; but paid no other taxes on said premises; and that the single payment on the twenty-fourth day of May, 1901, of the taxes for that year on part of the said premises, namely the said lot A and part of lot 3, was the only payment of taxes made by the complainant or her predecessor under the lease, in accordance with its provisions; that as to every other tax accruing due upon said property, and every part thereof, from the beginning of said lease until the month of May, 1901, the complainant and her predecessor under the lease at all times made default.

That this defendant is further informed and believes, and therefore avers, that the complainant and her predecessor in the lease in other respects made default in the performance of the covenants in

said lease on the part of the lessee to be observed, and performed, in this: that by the terms of said lease the lessee was required to use the first floor or the store part of said premises as a dry-goods and fancy-goods store, and the upper floors for residence and office purposes; whereas the said first floor has been used for other commercial business than a dry-goods and fancy-goods store, and the upper floors have not been used as a dwelling, or for offices, but as sales-rooms and workshops, and that for the purpose of so using said premises the entrance to the upper part of said building has been wholly cut off and destroyed.

36 This defendant further says that he is informed and believes that the complainant or her predecessor made other default in the performance of the covenants of said lease, in that the rent thereby reserved was not paid as stipulated, and this defendant states that Harry King, then the partner of the complainant in the possession of said premises, conducting business therein, and the administrator c. t. a. of the said Henry King, Junior, in his answer under oath, sworn to on August twelfth, 1901, and filed on August thirteenth, 1901, in the equity cause of The Ohio National Bank and others *versus* Caroline King and others, No. 19338 in equity, averred that the various amounts due under said lease for rent were then overdue and unpaid, and that the said lease was then liable to forfeiture.

Further answering said paragraph this defendant says that he is advised and believes, and therefore avers, that it is not material whether the complainant had complied with the covenants in said lease other than as in her said bill averred, but that since the complainant has specifically averred under oath the full, faithful and strict performance of each and every of the terms of said lease by herself and her predecessor therein, he is advised and believes that in making answer thereto it is his duty to set forth the true facts as they exist according to his information and belief.

6. Answering the sixth paragraph of said bill, this defendant says that on the thirteenth of April, A. D. 1899, the said sublot A, part of the said premises embraced in said lease, was sold for taxes to said Charles H. Wiltsie, as hereinbefore set forth; but that said sale was not an alleged sale but an actual one, and the purchase was not a pretended one but an actual one, the said purchaser, Charles H. Wiltsie having paid to the authorities of the District of Columbia the purchase price of said property at said sale.

This defendant is not informed and can therefore neither admit nor deny, that the said Wiltsie is largely engaged in the business of making pretended or attempted purchases of property in the District of Columbia at tax sale; but this defendant is informed and believes that the said Wiltsie has invested very large sums in purchases of property at tax sale, and has paid to the District of Columbia for purchases made by him in the year 1899, over one hundred thousand dollars, which said money the District of Columbia has received from said Wiltsie, and has applied to the lawful purposes of said

District for which the taxes on account of which said property was sold were authorized to be levied. And this defendant is informed and believes that the said Wiltsie invested said large amounts of money in good faith and that the authorities of the District received the same in good faith, and not in pursuance of any pretended or alleged sales, but in pursuance of actual sales, *bona fide* made, in pursuance of law and because of the default of the owners of the property sold in the discharge of their lawful obligation under the tax laws in force in said District.

Further answering said paragraph this defendant says that it is true that a certificate of the purchase by said Wiltsie of the said sublot A was issued to him by the collector of taxes, and he believes that the complainant's said Exhibit B is a correct copy
37 thereof, but for greater certainty and to avoid errors, he prefers to refer to the original certificate itself as to the terms and character thereof.

This defendant has no accurate knowledge as to the value of said sublot A, but upon information and belief he admits that it is worth many thousands of dollars. This defendant has no personal knowledge, and cannot therefore admit or deny the averment in said paragraph that the tax sale and issue of certificate thereof were wholly unknown to the complainant, or that she had no knowledge of any of the proceedings, or discovered the fact that the taxes had been unpaid until the latter part of the month of July, 1901; but he is informed and believes that the said averment is untrue, and if material he demands strict proof thereof.

And further answering said paragraph this defendant says that as hereinbefore set forth the complainant habitually and at all times with the single exception as to a part of said property hereinbefore set forth, made default in the payment of the taxes thereon, and that in paying such arrears as were paid in May, 1901, he is advised that the complainant then, if not before then, discovered the fact of said tax sale, and that the same was then unredeemable by reason of lapse of time.

7. Answering the seventh paragraph of said bill, this defendant says that he is informed and believes, and therefore avers, that it is true that in the month of July and on the twenty-fifth day thereof, the complainant received a letter from said Wiltsie dated July twenty-fourth, 1901, calling complainant's attention to the tax sale, and proposing to surrender the certificate if the complainant should give the matter her immediate attention; that this defendant is not advised as to whether or not the said Wiltsie offered to surrender said certificate "upon a very reasonable basis," as therein averred, but defendant is advised that the said Wiltsie in said notice gave full details of the items and amount of his claim. This defendant says that it is untrue that the complainant replied to said Wiltsie's letter immediately, but that the said complainant did not reply until the thirtieth of July. This defendant is informed and believes, and therefore admits, that it is true that the said Wiltsie demanded

in consideration of the release of said tax sale, the amount stated in said paragraph; but this defendant is advised and believes that the said Wiltsie had the legal right to make whatever demand he saw fit to make for the release of said tax-sale certificate, and that he could not legally be compelled to surrender the same for any consideration whatsoever.

Further answering said paragraph this defendant says upon information and belief that the averment therein that certain negotiations between the complainant and said Wiltsie then ensued until September twenty-fourth, 1901, is untrue, and that the fact is as the defendant is informed and believes, the complainant did not reply to said Wiltsie's offer made on August first, until August tenth, and then only to state that Mr. Harry King was out of town and that on his return on the following Monday said Wiltsie's letter would be laid before him; that no further communication was made
38 to said Wiltsie, and on the seventeenth of September, said Wiltsie again wrote to the complainant calling attention to the delinquent-tax sale and to the fact that in the letter of August tenth it was represented that Mr. Harry King would give the matter his attention upon his return the following Monday; that no reply was made to this letter of said Wiltsie's until September twenty-first, 1901, when the said Harry King addressed a letter to the said Wiltsie in which he claimed that the said Harry King had just returned to the city, having been away for a considerable length of time, although true it is that the answer of the said Harry King in the equity case with the Ohio national bank hereinbefore referred to, purports to have been signed and sworn to by the said Harry King in the District of Columbia before John Scrivener, a notary public of the District of Columbia on the twelfth day of August, two days after the said letter of August tenth, stating that he was out of the city, and a month and eleven days before his letter of September twenty-first; and in that said letter of September twenty-first the said Harry King offered to pay fifty dollars instead of one hundred dollars as the fee for releasing said tax sale, and stated among other things the following: "Unfortunately we have paid you quite a considerable amount of money in the past for tax sales. We are not interested in this piece of property in any way except as a tenant, as we are not the owners or mortgagees;" and this defendant is informed and believes, and therefore avers, that said letter of September twenty-first was the first attempt at negotiations with the said Wiltsie that occurred after said Wiltsie's letter of July twenty-fourth, 1901.

This defendant is further informed and believes, and therefore avers, that upon the receipt of said letter of said King of September twenty-first, the first offer made by said King for the settlement of said tax sale, one E. J. Watson, a clerk of said Wiltsie, on the twenty-fourth of September, wrote to said Harry King disclaiming authority to make any concession, but assuming the responsibility of accepting seventy-five dollars for the release of the certificate in-

stead of one hundred dollars, and advising said King that the said tax certificate was that day sent to the Central national bank, where it would be open to his examination and where payment could be made, and directing said King to call at the bank upon receipt of that letter and take up the certificate.

And this defendant is informed and believes, and therefore avers, that the said certificate remained at the said bank subject to payment by the complainant until after the close of banking hours on October first, and that at no time did the complainant or any one for her make any effort to redeem the same, or hold any further communication with the said Wiltsie; and that the said letter of said Harry King of September twenty-first and of said Wiltsie's clerk of September twenty-fourth, were the only communications in the nature of a negotiation between said parties. This defendant files herewith copies of the said correspondence with said Wiltsie, marked Exhibit Cohen No. 2.

39 8. Answering the eighth paragraph of said bill, this defendant has no personal knowledge of the facts therein averred as to the said Charles H. Knight, and his visit to the defendants Kann and the defendant Webb or between the defendant Webb and his client Marianne A. B. Kennedy, and if material he demands strict proof thereof. This defendant does not know the said Charles H. Knight, has never yet seen him, and has never held any communication with him upon any subject whatsoever. This defendant is informed and believes, and therefore avers, that it is true that said Knight called upon the defendants Kann and informed the defendant Louis Kann that the said premises 715 Market space had been sold for taxes, and that the said Louis Kann informed said Knight that the defendant H. Randall Webb was the counsel and representative of the owner of said property, and gave said Knight said Webb's office address. That on or about the twentieth day of September, 1901, the defendant Louis Kann met this defendant at luncheon, as had been their habit for many months past, and informed this defendant of the visit of said Knight, and his statement that the property had been sold for taxes, and that the said Kann had referred said Knight to the defendant Webb; and beyond which facts the defendant Kann gave this defendant no further or other information and the subject was not further discussed.

Further answering said paragraph this defendant says that on the thirtieth of September the defendant Webb called upon this defendant and informed this defendant that he, said Webb, had been informed by said Knight that the said property had been sold for taxes. To which this defendant replied that he had known that fact for some time, that the said defendant Louis Kann was the one who sent said Knight to said Webb, and that said Louis Kann had informed this defendant of the fact either the same or the next day after said Knight's visit. That the said Webb thereupon informed this defendant that his client Mrs. Kennedy had decided to forfeit the lease of the complainant because of the non-payment of

taxes, and that the said Webb desired to know if defendant's clients, the said Kanns, would lease the said premises at a rental of three hundred dollars per month and taxes, as they had some months before signified their willingness to do. This defendant informed said Webb that he would consult his clients and inform the said Webb, and later this defendant communicated with the defendant, Sigmund Kann, by telephone, and was by him authorized to say to said Webb that they would lease the said premises on the terms stated, provided possession were given them, and provided their offer was not used merely as a means to induce or compel the Kings to pay higher rent, which answer this defendant communicated to the said Webb the same day.

Thereupon the said Webb informed this defendant that the said tax sale was irredeemable, having been made more than two years before, and that it was held by one C. H. Wiltsie at Rochester, whom this defendant did not know. In the course of the conversation this defendant remarked to the said Webb, "Why don't you buy that certificate from Wiltsie?" To which the said Webb replied, "It is not necessary." Whereupon this defendant jestingly remarked "I believe I will buy it;" to which said Webb replied, "Oh, no, don't do that; don't add that complication to the matter."

At the time of said conversation this defendant did not intend to purchase said tax certificate, and the said remarks, so far as this defendant was concerned, were without purpose.

Further answering said paragraph this defendant says that the statement therein that a conference was held between this defendant and the defendants Kann "over a proposal that the said Cohen in his own name, but in reality as the agent of the said Kanns should purchase of the said Wiltsie the said tax title, and hold the same, and thereby be in a position the better to aid in enforcing the forfeiture of the complainant's lease for the benefit of the said Kanns," is false. That no such proposal was ever made or discussed or considered between this defendant and the said Kanns, and the true facts with respect to said conference are as follows: When this defendant informed the said Webb that his clients would take a lease of said premises on the terms stated as hereinbefore set forth, the said Webb agreed to said proposal, and in behalf of his client accepted the same, and this affiant supposed there was no doubt, and still believes that there is no doubt whatever of the legal and moral right of the lessor to terminate the lease and evict the tenant for the default in the payment of taxes, and that as the said Webb informed this defendant that his client had so decided, and would refuse the rent the next day when it was tendered and proceed to evict the tenant, this affiant regarded the matter of the lease to his client as settled, so far as an unwritten agreement could settle it. Later in the day this defendant called upon his codefendants, the said Kanns, and informed them that the said tax sale was irredeemable, and that in the opinion of this defendant it would be a wise thing for

the said Kanns to purchase the same, as this defendant believed the control of said certificate might facilitate the defendants Kann in securing possession of said premises. This defendant did not disclose to the said Kanns the manner in which the said certificate might be used, and this defendant had no definite idea himself at the time of what use would or should be made of the same, except that it could be used in hostility to both the Kings and the said Mrs. Kennedy in some way to prevent the former from attempting to dissuade Mrs. Kennedy from carrying out the agreement of lease made by her counsel Mr. Webb, and to compel her to observe that agreement should she be disposed to violate it at the instance of said King. It was with the purpose herein described but not disclosed or explained to the defendants Kann that this defendant advised the purchase of said certificate.

Further answering said paragraph this defendant says that it is untrue that the defendants Kann told this defendant that they had doubts whether it would be right for them to buy the tax title; that the said defendants never expressed any such doubt to this defendant, and never entertained any so far as this defendant knows. This defendant explained to said defendants Kann that the tax-
41 sale certificate was transferrable under the law, and good in the hands of any purchaser, and the only doubt expressed by the defendants Kann was as to the business expediency of investing money in a tax-sale certificate of the definite use of which this defendant could not and did not make any definite explanation other than it might be available to secure possession of said premises. The said defendants Kann thereupon committed the matter to the judgment of this defendant, and when this defendant and the said Kanns separated it was not definitely decided whether this defendant should purchase the same or not. After some further consideration of the matter this defendant telephoned to the District Title Insurance Company, and finding that the office was not yet closed, although it was then after 5 o'clock, arranged with the president to wait at the office and keep open the vault, and this defendant thereupon went to said office and from said company obtained the necessary information from said company's records of the tax sales, to identify the certificate pertaining to said property; and thereupon this defendant consulted the president of said company and asked his opinion as to the validity of said tax-sale certificate, and was advised by the president of said company that in his opinion the said certificate was good and valid, and would pass a good title to said premises; for which consultation and information this defendant paid to the said company its charge.

Thereupon this defendant decided to go to Rochester and purchase said certificate.

But, this defendant thinking that the said Webb might object to defendant's course and complain of it, and desiring to avoid the appearance of any concealment of his purpose from the said Webb, went to the said Webb's residence, it being then six o'clock in the

evening, and while standing on said Webb's doorstep awaiting an answer to his ring, the said Webb arrived at his house. Whereupon this defendant said to said Webb, "I have come to notify you that I am going to Rochester tonight to buy that certificate; and you and I must deal at arm's length." To which the said Webb replied protestingly, "I don't know about that;" to which this defendant answered, "Well, I do." The said Webb thereupon indicated his dissent from this defendant's purpose, by stating that he, said Webb, did not think this defendant had the right to purchase said tax certificate, because in so doing this defendant would be acting upon information derived from him, said Webb; whereupon this defendant corrected said Webb's statement, reminding said Webb that this defendant had not received his information of the tax sale from said Webb, but that he had known it long before said Webb had, and had learned it through his clients, the Kanns, who had been informed of the fact by said Knight and had sent said Knight to said Webb. The said Webb still indicated his objection to this defendant's course, but remarked that he did not see how he, the said Webb, could prevent it. Whereupon this defendant left said Webb, and proceeded to his home to prepare for his trip to Rochester.

42 This defendant then ascertained through another member of the bar who had had dealings with said Wiltsie the address of said Wiltsie in Rochester, and that said Wiltsie would probably require a large sum of money for said certificate, it being irredeemable. This defendant then telephoned to Baltimore to the defendant Sigmund Kann, and informed said Sigmund Kann that he had been advised by the president of the said title company that the said tax sale was valid and that this defendant would go that night to Rochester and purchase the same from Wiltsie.

The statement in said paragraph that the said Webb, acting in behalf of Mrs. Kennedy, entirely acquiesced in the course of this defendant, is false. The said Webb did not acquiesce in the course of this defendant, but expressly dissented therefrom. This defendant does not know of any effort that the said Webb or the said Kennedy made to prevent the acquisition of said tax title by this defendant, nor does he know of anything either of them could have done to prevent the same. Before this defendant advised the said Webb of his purpose, this defendant was fully decided to leave for Rochester by an early train, and did so leave with sufficient funds in his possession to purchase said certificate. This defendant is advised and believes, and therefore avers, that he had the legal right to purchase said certificate, and that the said Webb could not by any legal procedure have prevented this defendant's departure for Rochester, or his acquisition of the tax title. This defendant has no personal knowledge as to what the complainant would have done had she been advised of this defendant's purpose, but he is ready to believe that the averment in said paragraph that she would, if so advised, have gone to the bank and taken up said tax certificate immediately, is true, as that would apparently have been in her own in-

terest, although it is true in fact that during all the time from the twenty-fifth of September until the close of banking hours on the first of October when it was mainly in the interest of the defendant Kennedy that said tax certificate should be redeemed, the complainant took no steps for its redemption. Had this defendant been aware of the fact that the tax certificate was in a bank in this city this defendant would not have gone to Rochester, but this defendant did not learn that fact until after his arrival at Wiltsie's office in the city of Rochester, late in the afternoon of the first of October, and after the close of banking hours.

Further answering said paragraph, this defendant says that he has no personal knowledge of what was contemplated by the said Marianne A. B. Kennedy as to the purchase of said tax certificate, but he is informed and believes, and therefore avers, that she had no knowledge whatever of this defendant's purpose until after it was accomplished, and the deed made in pursuance of said certificate had been executed and recorded, and he therefore avers that it was impossible for her to have had any purpose or contemplation on the subject. But this defendant says that the averment in said paragraph that it was never contemplated by the defendants Kann that the said tax certificate should be purchased for the pur-
43 pose of using the same adversely to said Mrs. Kennedy, or in any manner to endanger her title, is false, and that the purpose of the said Kanns and of this defendant was to use it in hostility to the said Mrs. Kennedy and the said Kings and all persons whomsoever, and in whatever lawful manner would best avail the defendants Kann to secure possession of said premises, and this defendant positively denies and is advised that he has the right to characterize as absolutely false, the assertion in said paragraph that an agreement or understanding expressed or tacit, existed between this defendant or the defendants Kann, and any person whomsoever, that the said tax title should be used only in furtherance of the design to have the complainant's lease forfeited. And this defendant avers that no such agreement or understanding, expressed or tacit, or anything approaching such an agreement, or which the said Webb or the said Mrs. Kennedy or any other person could by any possibility have supposed or believed constituted or implied any such agreement, ever at any time existed.

This defendant denies that he has ever declared that he doubted the propriety of the purchase of said tax certificate, and that upon his said journey to Rochester for the purpose, his doubts upon the subject prevented him from sleeping, but that because of the conduct of the complainant's son towards the defendants Kann in a former transaction, he thought he might properly proceed to purchase the tax title for the defendants Kann and hold it, and afterwards determine what could or should be done with it. This defendant did on October 30, 1901, declare to J. J. Darlington, Esq., counsel for the complainant, that at the time he was in doubt about the purchase of said tax certificate, and this defendant may have

used the word "propriety," though he does not recollect its use, but he did not use it in the sense of expressing any doubt as to the rightfulness, moral or legal of his conduct, and this defendant never at any time had the slightest doubt but on the contrary was and is entirely convinced of the entire legality and absolute morality of the said transaction in every particular, and that the doubt which he entertained was purely a business doubt as to the expediency of the transaction and the efficiency of the certificate to aid his clients in their lawful purpose to acquire possession of the property, the lease of which he was advised had been lawfully forfeited by the unlawful conduct of the tenant, and which forfeiture he was advised the landlord had decided to enforce, and which the said landlord did enforce by the return of the rent and declaration of forfeiture, in entire ignorance of the fact that this defendant was on his way to purchase the said tax certificate.

This defendant admits that upon his arrival in Rochester he discovered that the said tax certificate was deposited in the Central national bank in Washington, of which fact this defendant was until then ignorant, and the true account of what then took place is as follows: That when this defendant approached the said Wiltsie and offered to buy said certificate the said Wiltsie directed a clerk to bring him the papers relating thereto, and upon looking over
44 the same informed this defendant that the certificate was in the Central national bank in Washington, where it had been since the twenty-fifth of September, 1901, subject to redemption by the complainant under an offer by said Wiltsie's clerk to accept a certain amount if redeemed immediately. Thereupon the said Wiltsie inquired of this defendant if this defendant represented the owner, the mortgagee or the tenant, and this defendant informed said Wiltsie that he did not. Said Wiltsie then said that the complainant had had plenty of time to purchase the said certificate, and had not done so, and did not seem to care what became of it, and he asked this defendant what he would give for it, to which this defendant replied that he would give five hundred dollars. Thereupon the said Wiltsie telephoned to the Central national bank at Washington, to ascertain if the said certificate had been redeemed by the said Kings, and finding it had not, directed the bank to return it to said Wiltsie by that night's mail, and confirmed said telephonic direction by a telegram. It was then nearly four o'clock in the afternoon.

The next day the second of October, the certificate was received by said Wiltsie's clerk in the mail, and delivered to this defendant, who paid for the same the sum above stated. It is true this defendant purchased the same as the agent for the defendants Kann, who furnished the money, and it is true that this defendant declined to disclose to one of complainant's counsel what he had paid for said certificate, as he also refused to disclose to said Webb, and has never disclosed to any one save his clients and their counsel until this

time, because he is advised that it was the private business of his clients.

Further answering said paragraph this defendant says it is true that he was expeditious in securing said tax deed, as he endeavors to be in all matters of business committed to him, and he believes that the copy of said deed marked Exhibit B–2 is a correct copy of said tax deed, but for accuracy he prefers to refer to the original.

9. Answering the ninth paragraph of said bill this defendant says that he has no personal knowledge of the facts therein averred, and can neither admit nor deny the same, and if material he demands strict proof thereof. But he denies the averment therein of the existence of "the aforesaid project to enforce a forfeiture against her and to embarrass her right to be relieved against the same by having an apparent third party acquire title to the property through the said tax proceedings," and says that no such project ever existed, and that the averment that there was such a project is false and unfounded in fact. This defendant also denies that the defendants "claim that an agreement existed between them to the effect that if the defendant Kennedy will by all means in her power enforce the said forfeiture and if she succeeds therein lease the said premises to said defendants Kann the latter will not seek to enforce the tax title against her, but if she will not so insist upon the said forfeiture then the defendants Kann will set up an adverse title against her;" and this defendant says that he never asserted the existence of any such agreement, and knows that no such agreement ever existed, and that the true fact in regard to the attitude of the said defendants in the use of said tax certificate after it was acquired are fully and truly set forth in the answer of the said defendants Kann in answer to this paragraph of the bill.

Further answering said paragraph this defendant says that the statements therein contained as to the interview between the counsel for the complainant and this defendant on the fourth of October, are not correct but he is advised it is immaterial.

11. Answering the eleventh paragraph of said bill, this defendant says he has no personal knowledge of the communications and transactions therein set forth between the counsel for the complainant and the said Marianne A. B. Kennedy, and her counsel, and if material demands strict proof thereof. Further answering said paragraph this defendant says it is untrue that the parts of property mentioned in Complainant's Exhibit G have never been considered or treated by the parties as covered by the lease, but on the contrary that the major portion of said land is actually included within the walls of said building, and no part of it is accessible except through said building, and the same has been enclosed and used as a part of said premises during the entire lease, and for very many years theretofore. And this defendant upon information and belief denies that the taxes thereon have always been paid by the defendant Marianne A. B. Kennedy, and says that on the contrary they were paid by her together with all the other taxes on said property which

the lessee should have paid until May 1897, but that after that date the said Marianne A. B. Kennedy being advised that the tenant had to pay the taxes on said premises never paid the taxes on any part of the said premises, and that such failure to pay on the part of said Kennedy does not illustrate inadvertence and oversight on her part, but merely shows that she ceased to bear the burden which the lease had imposed upon the tenant.

12. This defendant has no personal knowledge of the facts set forth in the twelfth paragraph of said bill, but he is informed and believes, and therefore avers, that the said averment- of facts are untrue.

13. Answering the 13th paragraph of said bill, this defendant says that the averments of fact therein contained are untrue; that the said Dr. Fry was not the representative of Mrs. Kennedy and did not claim to be so to this defendant or to counsel for the defendants Kann in the interview referred to, but on the contrary expressly disclaimed being her representative or having any authority to speak for her or to interfere with the management of her case in the hands of her counsel, Mr. Webb, and that on said occasion he did not undertake to explain the attitude, wishes or desires of the said Mrs. Kennedy but merely expressed his own views, which were that his patient was liable to be seriously affected in her health if litigation should ensue, and that he wished to avoid litigation in the premises. Prior to said interview Dr. Fry had called to see William G. Johnson, of counsel for the defendants Kann,
and had requested him to call upon said Fry, which he did,
46 as this defendant is informed and believes and therefore
avers, solely for the purpose of explaining to said Dr. Fry, who had theretofore been in conference with the complainant's counsel, the true state of the case from the standpoint of this defendant and of the defendants Kann. Said Dr. Fry was then informed that litigation was inevitable because if the said Mrs. Kennedy did not compromise the tax title with the defendant Cohen, litigation would ensue thereon through which she might lose her entire estate, and that in order to effect the compromise with said Cohen, it was necessary to enforce a forfeiture of the lease of the complainant. On that occasion said Dr. Fry disclaimed any intention to interfere with the authority and judgment of the defendant Webb as counsel for Mrs. Kennedy in the premises, but expressed his individual opinion that it would be better for Mrs. Kennedy to litigate the question of the tax title than the question of forfeiture, but said Dr. Fry subsequently changed his opinion on this subject, as this defendant is informed and believes and therefore avers, and counselled Mrs. Kennedy in accordance with the advice of her counsel, the defendant Webb, to enforce said forfeiture, and she subsequently signed the complaint in the landlord and tenant proceedings, in his presence, with his entire approval and in accordance with the advice of her counsel, and he (Dr. Fry) himself delivered the said complaint signed by Mrs. Kennedy to her counsel, the defendant Webb.

Further answering said paragraph, this defendant states that he is advised that the attitude and the opinion of the said Dr. Fry is wholly immaterial to the merits of this proceeding; that he was not a party in interest and had no authority in the premises and was merely the friend and physician of Mrs. Kennedy and his intervention in the matter was solely in the interest of her health and to relieve her from the distress and anxiety of litigation of any sort with any persons whomsoever.

14. Answering the 14th paragraph of said bill, this defendant says upon information and belief that the averment of fact therein contained to the effect that the defendant Marianne A. B. Kennedy, under the pressure and menace thus brought to bear upon her, instituted a landlord and tenant proceeding against the complainant for the possession of said premises, is false; that neither this defendant nor the defendants Kann nor any one representing any one of them ever approached Mrs. Kennedy or communicated with her in any way, or threatened or menaced her in any manner whatsoever, and that her institution of the said landlord and tenant proceeding was her free and voluntary act, done under the advice of her counsel and of her physician and friend, Dr. Fry, in whose presence and with whose concurrence and approval, as hereinbefore stated, she signed the said complaint, and to whom she delivered it for delivery to her counsel. This defendant further says upon information and belief that the complainant, through counsel and through the said Dr. Fry, endeavored to dissuade Mrs. Kennedy from following the advice of her own counsel, the defendant Webb, and have her condone the forfeiture of the complainant and release her
47 from the consequences thereof, in opposition to the advice of her own counsel, and after she had under the advice of counsel and with the approval and concurrence of her physician and friend, decided to insist upon her right of forfeiture and to terminate the lease, and had under such advice and with the approval and concurrence of her said physician, given written notice of such determination to the complainant. And this defendant further says that he is informed and believes and therefore avers that on the 30th day of October the defendant Webb, as counsel for the said Mrs. Kennedy, made a written proposal to the counsel for the complainant offering to waive the forfeiture and permit the complainant to remain in possession and continue the lease, if the complainant would undertake, at her own expense by a proper proceeding, to defeat the tax title, and in the event of failure in such litigation and the establishment of the tax title, indemnify the said Mrs. Kennedy for the consequent loss of her property, but that the complainant through her counsel refused so to do, of which the said Mrs. Kennedy and her friend and physician, Dr. Fry, were informed, and this defendant is further informed and believes and therefore avers that the said Dr. Fry, upon being informed of the refusal of complainant's counsel to have the tax title set aside and indemnify the said Mrs.

Kennedy in the event of an adverse termination of such proceeding, went again to the complainant's counsel and ascertained from said counsel that the complainant definitely refused compliance with said demand of Mrs. Kennedy's counsel, and this defendant is informed and believes and therefore avers that it was largely because of the refusal of the complainant to undertake to have the tax title set aside and to indemnify Mrs. Kennedy in the event that such litigation should be unsuccessful, that the said Dr. Fry concurred in the advice of Mrs. Kennedy's counsel to proceed to prosecute the proceedings of forfeiture of the lease and not because of any pressure, threats or menaces on the part of this defendant or the defendants Kann.

15. Answering the 15th paragraph of said bill, this defendant says that he is advised and believes and therefore avers that the proceedings for the sale of the property for the second instalment of taxes for the year ending June 30, 1898, are regular, effective, legal and valid, and that the averments in the said paragraph of said bill and the several subparagraphs thereof are untrue in fact and incorrect in law, but this defendant is further advised and believes and therefore charges that the question of the validity of said tax sale is one with which the complainant has no concern, and is wholly between the defendant Webb and this defendant, and that this court is without jurisdiction to inquire into and determine as to the validity of said tax sale in this proceeding at the instance of the complainant and that this court has no power to make any decree as to the validity or invalidity of said tax sale binding upon this defendant or the defendant Webb, and that if this court had such jurisdiction and should adjudge the said tax sale to be valid, the effect of said decree would be to defeat the title of the defendant Webb to
48 the said property and vest the same absolutely in this defendant, at the instance of the complainant, the defaulting tenant, whose violation of her covenants gave rise to the said tax sale, and this defendant is advised and believes and therefore avers that the complainant has no right thus to imperil the title of the defendant Webb, and he claims the same benefit of these objections as though he had specially demurred to the bill therefor.

16. Answering the 16th paragraph of said bill, this defendant denies that any of the irregularities, defects and failures to comply with the requirements of statute existed, and he also denies that this court has jurisdiction to inquire into any question touching the validity of said tax sale or the title thereunder in these proceedings, and he claims the same benefit of this objection as if he had especially demurred to the bill therefor.

Further answering said paragraph, this defendant says that he is informed and believes and therefore avers that the statement in said paragraph that the defendants Kann were informed by the said Charles H. Knight that the tax sale was invalid because of the failure to advertise the same in the name of the owner, as required by the statute or for any other reason, is false, and that said defendants Kann were not informed by the said Knight that the said tax sale

was invalid, nor of any facts or circumstances relating to the same, beyond the mere fact that the same had taken place, and that the only advice that this defendant or the defendants Kann had with respect to the validity of said tax sale before the acquisition of the certificate by this defendant, was the advice of a competent attorney and president of the District Title Company, who advised this defendant that in his opinion the said tax sale was in all respects regular and valid, which opinion was subsequently concurred in by the only other counsel of whom this defendant or the said defendants Kann ever sought any advice on the subject or from whom they received any opinion or suggestion relating thereto.

Further answering said paragraph, this defendant denies that the failure to pay taxes on said property for which the sale was held and the said cerrificate issued, was wholly an innocent oversight, and on the contrary this defendant avers that the records of the tax office show that it was one of a continuous series of defaults, beginning with the first payment of taxes after the lease was assigned to her on the 26th of August, 1897, and continuing down to the 24th day of May, 1901, on which date only the complainant paid taxes on part of the property when due and at no other time during her entire ownership of the lease has she paid any of the taxes when due, but has suffered each and every of them to become and be in default and the property be repeatedly sold at tax sale by reason of said default.

Further answering said paragraph, this defendant denies that the tax title stands as a cloud upon the title of the complainant but only affects the title of the defendant Webb, and he denies that the same was being used as a menace to the said Marianne A. B. Kennedy to prevent her from waiving forfeiture of said lease and
49 from adjusting amicably with the complainant the forfeiture of said lease. This defendant further says that he is advised and believes and therefore avers that the question of whether or not the complainant has incurred a forfeiture of her lease or whether or not the defendant Webb, as devisee of said Kennedy, has the right to enforce the same, and whether or not the complainant has the right to be relieved from said forfeiture, are questions wholly between the complainant and the said Webb, with which this defendant is not concerned, and that in uniting this defendant and his codefendants Kann in the controversy with respect to the validity of said tax title, in which the complainant is not interested and in respect to which he has no rights, the said bill is made multifarious and this defendant claims the same benefit of this objection to said bill as if he had demurred thereto.

17. For answer to the bill of revivor filed herein, this defendant says:

1 & 2. Answering the first and second paragraphs of the bill of revivor, this defendant says that the averments therein contained as to the prior proceedings in this cause are substantially correct but that for accuracy he refers to the proceedings themselves.

3. Answering the third paragraph, this defendant says that it is true that the said Marianne A. B. Kennedy died on the 4th day of December, 1901, leaving a will and codicil whereby she devised to the defendant Webb all her estate, real and personal, including the premises 715 Market space in trust to sell, and out of the proceeds to pay legacies, the exact amount of which this defendant is not advised, nor is this defendant advised as to the amount, character or value of the estate of said Marianne A. B. Kennedy, and if material requires proof thereof, and this defendant admits that the said will and codicil were duly admitted to probate and record as a will of real and personal property in the probate court of this District, on the 17th of January, 1902. This defendant has no personal knowledge as to who are the heirs-at-law of said Marianne A. B. Kennedy, but he is informed and believes that she left no lineal descendants and that her heirs-at-law and next of kin are all collaterals. This defendant is further informed that as to the real estate embraced in the lease in this cause described, a part thereof descended to the said Kennedy on the part of her mother and a part thereof was acquired by purchase, and that the said Maria Gillis Dewey, made defendant to said bill of revivor, is a collateral heir of the said Mrs. Kennedy on the part of her mother but not a collateral heir on the part of her father, and that as such she is not entitled by descent to any part of the said real estate which the said Marianne A. B. Kennedy acquired by purchase and is not therefore entitled by descent to the whole of the real estate involved in the lease.

4. Answering the fourth paragraph of said bill of revivor, this defendant admits that the defendant Webb has notified the complainant that he claims to be entitled to possession of said premises, 715 Market space, and that it is his purpose to prosecute proceedings against the complainant to recover possession of same under the notice to quit given by the said Marianne A. B. Kennedy in her lifetime. As to the rest of said paragraph, this defendant is advised that the same is matter of law, as to which this defendant is not required to make further or other answer, but he denies that any one but the said Webb is entitled to possession of said premises.

Further answering said paragraph, this defendant is advised and believes and therefore avers that it is immaterial to the rights of the complainant what interest or estate or rights of possession the said Maria Gillis Dewey may have with respect to said real estate under said will, because this defendant is advised and therefore avers that if the said lease is valid and continuing, complainant is entitled to possession thereof, and that the question of the forfeiture of said lease is wholly a matter between the complainant and the said Webb, as the devisee of said estate, and the successor of his testatrix in the said contract of lease.

5. Answering the fifth paragraph of this bill of revivor, this defendant says he is informed and believes and therefore avers that it

is true that said Webb will institute proceedings threatened by him, but that he is informed and believes that the said Maria Gillis Dewey has no right to institute any such proceedings; and having fully answered, he prays to be hence dismissed with his reasonable cost.

MYER COHEN.

WM. G. JOHNSON,
Sol. for Def't Cohen.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the answer by me above subscribed and know the contents thereof; and that the facts therein stated upon my personal knowledge are true and those stated upon information and belief I believe to be true.

MYER COHEN.

Subscribed and sworn to before me this 16th day of April, 1901.

[NOTARY'S SEAL.] OSCAR LUCKETT,
Notary Public, D. C.

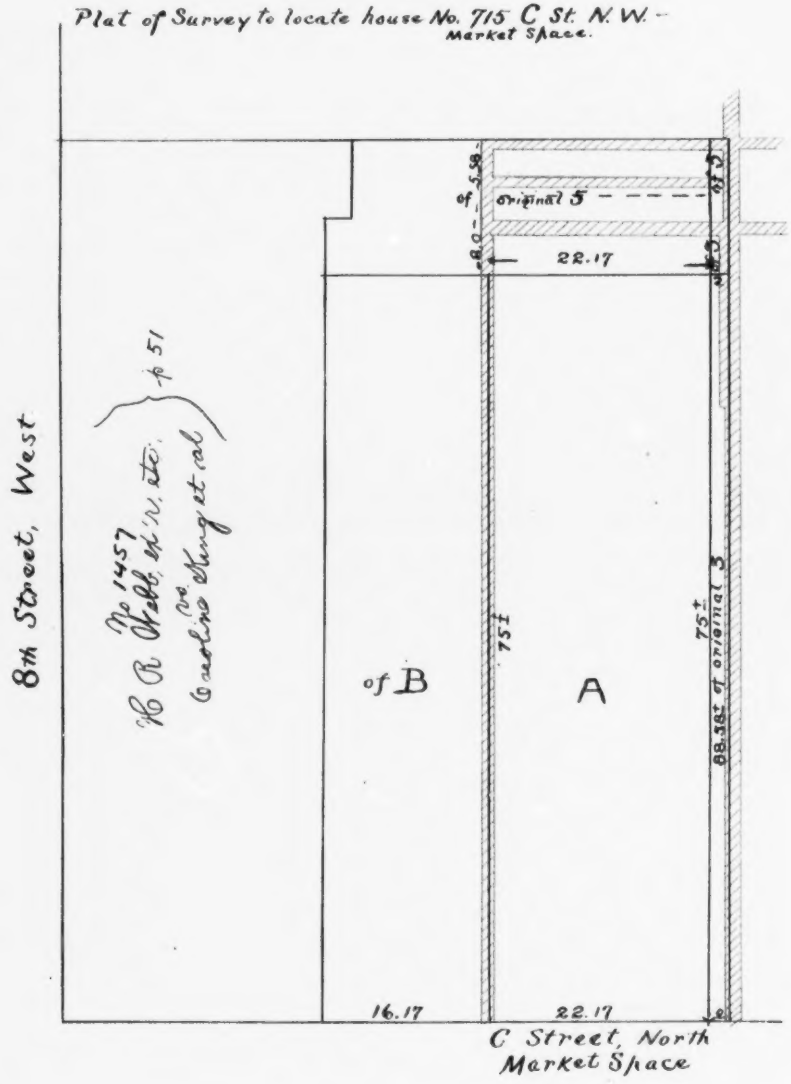
(Here follows diagram marked p. 51.)

EXHIBIT COHEN NO. 1.

Filed, APRIL 18, 1902.

Square 432

Plat of Survey to locate house No. 715 C St. N.W. – Market Space.



52 EXHIBIT COHEN NO. 2.

Filed April 18, 1902.

WASHINGTON, D. C., *July* 30, 1901.

Mr. Charles H. Wiltsie, Rochester, N. Y.

DEAR SIR: We are in receipt of your communication, in reference to sublot A, square 432, assessed in the name of Maria T. Gillis, and in reply will say that we are willing to pay a reasonable amount for the redemption of same.

Please advise us and oblige

Respectfully yours, H. KING, JR.

Copy.

#909–Wash.–99.

AUGUST 1, 1901.

H. King, Jr., 810 7th street N. W., Washington, D. C.

DEAR SIR: Your letter of July 30, with reference to tax certificate against sublot A, square 432, in the name of Maria T. Gillis, has been duly received. I will assign or surrender this certificate upon the following computation:—

Face of certificate	$143.83
Recorder's fee	.10
Aggregate	$143.93
Interest, two years, four months at 15 %	50.38
Charge for releasing	100.00
Total	$294.31

Please send New York draft or postal money order, and I will send the tax certificate directly to you; or, if you prefer, notify me as soon as you are ready to make payment and the certificate will be sent to the Central National Bank of Washington, which is my fiscal agent, where the papers will be open to examination and payment can be made. The papers will be duly released and also assigned in blank so that any name can be inserted.

Respectfully yours, —— ——, *Clerk.*

In correspondence please refer to serial #909–Wash.–99.

Copy.

909–Wash.–99.

WASHINGTON, D. C., *Aug.* 10, 1901.

Chas. H. Wiltsie, Rochester, N. Y.

DEAR SIR: In reply to yours of 1st inst.—# 909–Wash.–99, we beg to say that our Mr. Harry King is out of town at present.

53 On his return next Monday, we will lay your letter before him for reply.

Truly,

H. KING, JR.
R. W.

Copy.

909–Wash.–99.

SEPTEMBER 17, 1901.

H. King, Jr., 810 7th St. N. W., Washington, D. C.

DEAR SIR: I write to call your attention to the delinquent-tax-sale certificate which I hold against sublot A, square 432, in the name of Maria T. Gillis, and to ask when same is to be taken care of. In your letter of August 10th you stated that Mr. Harry King would give this matter attention upon his return the following week. I have heard nothing further with reference to the matter and I shall esteem it a favor if you will write me by return mail stating when this matter is to have attention. I am desirous that the certificate should be taken up at an early date.

Very respectfully yours,

CLERK.

N.

In correspondence please refer to serial # 909–Wash.–99.

Copy.

WASHINGTON, D. C., *Sept.* 21, 1901.

Mr. Charles H. Wiltsie, Rochester, N. Y.

DEAR SIR: I have just returned to the city, having been away for a considerable length of time, and in reply to your communication will say that we are desirous of taking up the certificate that you have, but the $100.00 redemption is very large. In view of the fact that the penalties on this property are heavy and the amount for which it was sold was very small, I think that a redemption of $50.00 would be about just and equitable. I hardly think it is your desire to squeeze us or to be unreasonable. Unfortunately we have paid you quite a considerable amount of money in the past for tax sales. We are not interested in this piece of property in any way except as tenant, as we are not the owners or the mortgagees. If it should meet with your approval send us a bill and we will send check.

Respectfully yours,

HARRY KING.

Dict. H. K.

Copy.

909–Wash–99.

SEPT. 24, 1901.

Harry King, 812 Seventh St. N. W., Washington, D. C.

DEAR SIR: Your letter of September 21st addressed to Mr. Wiltsie with reference to the redemption of the delinquent-tax-
54 sale certificate which he holds against sublot A, in square 432, assessed in the name of Maria T. Gillis, has been duly received. You state that you think the charge for the release of this certificate is too much. Mr. Wiltsie is absent from his office and I have no authority to make any concessions on such certificates, but if you will take up this matter promptly, I will assume the responsibility of accepting $75 for the release of this certificate. There is now two years six months' interest due and I make a computation on this basis as follows:

Face of certificate	$143.83
Recorder's fee	.10
Aggregate	$143.93
Interest two years six months at 15 %	53.97
Charge for releasing	75.00
Total	$272.90

Believing that you will accept this offer, I have today sent these papers to the Central National Bank of Washington, with receipt on you for $272.90, where they will be open to your examination and payment can be made. Please call at the bank upon receipt of this letter and take up the papers promptly.

Very respectfully yours, E. J. WATSON,
Man'g Clerk.

Dic. (E. J. W./N.)

55 *Addition to Record per Stipulation of Counsel.*

Court of Appeals of the District of Columbia, October Term, 1902.

HENRY RANDALL WEBB, Executor and Devisee of Marianne A. B. Kennedy, Deceased, Appellant, *vs.* CAROLINE KING, MEYER COHEN, SIGMUND KANN and Louis Kann, and Maria G. Dewey. } No. 1241. No. 14, Special Calendar.

Filed September 17, 1902.

Court of Appeals of the District of Columbia, October Term, 1902.

HENRY RANDALL WEBB, Executor and Devisee of Marianne A. B. Kennedy, Deceased, Appellant, *vs.* CAROLINE KING ET AL. } No. 1241. No. 14, Special Calendar.

56 It is hereby agreed between counsel in the above-entitled cause that the affidavit of Meyer Cohen filed April 18, 1902 in the cause No. 22834, Caroline King *vs.* Marianne A. B. Kennedy, *et al.*, in the supreme court of the District of Columbia, holding an equity court, which was inadvertently omitted from the transcript of the record of said cause on appeal, be made part of the record and printed as part of the transcript of record on appeal in the above-entitled cause No. 1241, in the Court of Appeals of the District of Columbia.

J. J. DARLINGTON,
Of Counsel for Complainant.
WM. G. JOHNSON,
For Kanns, Appellees.
ANDREW Y. BRADLEY,
Sol'r for Maria G. Dewey.
E. S. THEALL,
Sol'r for Appellant.

(Endorsed:) No. 1241. H. Randall Webb *et ux.* & dev. of Marianne A. B. Kennedy, deceased *vs.* Caroline King *et al.* Stipulation of counsel as to addition to record. Court of Appeals, District of Columbia. Filed Sep. 17, 1902. Robert Willett, clerk.

57 *Affidavit of Myer Cohen.*

Filed April 18, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING, Complainant,
vs.
MARIANNE A. B. KENNEDY ET AL. } In Equity No. 22834.

Myer Cohen, being first duly sworn, deposes and says that he is one of the defendants in the above entitled cause and for more than five years past has been the general counsel of the defendants Kann. In the spring of 1901 the defendants Kann informed the defendant Webb that they would be willing to take a lease of said premises 715 Market space from the said Mrs. Kennedy and pay her the annual rental of $3600 a year and the payment of all taxes, being $1200 per annum more than she was then receiving from the property. No negotiations with respect to this offer ever took place. During that spring and summer it was the habit of this affiant to meet the said Kanns at luncheon almost daily, on which occasions matters of business were generally discussed.

On or about the 19th or 20th of September, at one of said meetings at luncheon, the defendant Louis Kann, in the presence of the defendant Sigmund Kann, informed this affiant that one Knight had called upon him, said Louis Kann, and informed him that the taxes on said premises 715 Market space had not been paid and that the said premises had been sold for said taxes and that the said Kann had referred said Knight to the defendant Webb as the
58 attorney and representative of the owner, Mrs. Kennedy, and had given said Knight said Webb's office address. This communication was not made to this affiant as a matter of business and it was not discussed in any way, but affiant was merely informed of it as a matter of news or gossip pertaining to the neighborhood and this affiant never took any steps to ascertain anything on the subject and never considered the matter or spoke of it to anyone thereafter until the 30th of September, 1901. In the forenoon of the 30th of September, the said defendant Webb asked this affiant if affiant's clients the Kanns were still willing to lease the said premises 715 Market space at the rate of $300 per month and payment of all taxes, as they had in the spring suggested. This affiant informed said Webb that he would communicate with his clients and notify him of the result. Affiant did communicate with the defendant, Sigmund Kann by telephone, reporting to him said Webb's inquiry, and the said Sigmund Kann authorized this affiant to state to said Webb that they would lease said premises on the terms stated, but on the condition that possession of the premises be given to them,

and that their said willingness be not used merely as a means to compel the Kings to pay a higher rent. About one p. m., this affiant informed said Webb of his client's answer to said Webb's inquiry and the said Webb then and there agreed, in behalf of his client, Mrs. Kennedy, to give affiant's client a lease of the said premises on the terms stated, then repeating to this affiant that the complainant had forfeited the lease to her by the non-payment of taxes, of which defendant Webb had been informed by one Knight on the 25th instant. That the said tax-sale was then, by
59 lapse of time, irredeemable. That his said client, Mrs. Kennedy, had decided to forfeit the lease and had instructed him, said Webb, to seek another tenant in the place of the complainant. On said occasion said Webb also informed this affiant that the certificate of said tax-sale was held by one C. H. Wiltsie, of Rochester. Thereafter this affiant called upon his said clients and advised them that in his opinion it would be wise for them to purchase the said tax-sale certificate, as in this affiant's opinion it might be the means of enabling the defendants Kann to secure possession of said property. Affiant did not explain in what mode the said tax certificate might be so used and had no definite idea on the subject himself at the time. This affiant had never before purchased a tax certificate and had no experience with same, and only knew in a general way of the character of tax sales. Affiant's clients, the defendants Kann, expressed their doubt as to the advisability of investing money in this certificate, the exact use for which was not explained or stated by this affiant, but upon affiant's advice that in the judgment of affiant it might be useful to them in gaining possession of said premises, they authorized affiant to purchase the same if affiant saw fit, and no definite decision was reached between this affiant and his said clients on the subject.

In the afternoon, after some consideration of the subject, this affiant telephoned to the District Title Company and made an appointment with Mr. Watson J. Newton, the president, to remain at his office until this affiant could reach there, for the purpose of
60 examining the records of said company, and on arriving at said office this affiant explained to the said Newton that affiant wished to be informed of the record of the tax sale of said property, as he was contemplating purchasing the same, and the said Newton thereupon consulted the records of his said company and gave this affiant the necessary information to enable the affiant to identify the property sold under tax-sale by lot and square number.

On leaving the said company's office, this affiant asked the said Newton his opinion as to the legality of said tax-sale and of a tax-deed thereunder, and the said Newton expressed the opinion to this affiant that the same was valid and regular, and that if affiant could secure peaceable possession of the premises under said deed, in the opinion of said Newton affiant would acquire an indefeasible title to

the premises. For the services so rendered this affiant, by said Newton, this affiant paid the charge of said company.

Affiant having decided to go to Rochester and purchase the said tax certificate, and not wishing to appear to the said Webb as having done so secretly and without notice to him, this affiant, it being then nearly six o'clock, went to said Webb's house, and while waiting for an answer to this ring at the bell the said Webb approached on the street, whereupon the colloquy took place between said Webb and this affiant, as fully set forth in the eighth paragraph of affiant's answer.

This affiant then returned to his house and telephoned to Mr. John Ridout, a member of the bar, and obtained from him the business address in Rochester of said Wiltsie, and telephoned to his
61 client, Sigmund Kann, in Baltimore, informing said Sigmund Kann that this affiant had finally decided to purchase said tax certificate and was going to Rochester for the purpose, and also informed said Sigmund Kann of the opinion given to the affiant by said Newton as to the validity of said tax-sale.

Affiant then went to Rochester and the next day saw said Wiltsie, between three and four o'clock, p. m., and learned from said Wiltsie what affiant had not known or suspected, that the said tax certificate was in this city at the Central national bank, and had been there subject to redemption by the said complainant since the 25th. of September. The said Wiltsie then asked affiant if affiant represented the owner, mortgagee or tenant of said premises, and affiant informed him that he did not. The said Wiltsie then inquired of this affiant whom he did represent and this affiant declined to state, whereupon said Wiltsie remarked that it was of no consequence to him, said Wiltsie, that he had given said King ample time to redeem said certificate and the said King did not appear to care about it, and asked affiant what he, affiant, would give for the same. This affiant replied that he would give $500 therefor, to which said Wiltsie immediately replied that affiant could have it, and then telephoned to the Central national bank at Washington to ascertain if the said certificate had been redeemed by said King, and ascertaining that it had not, directed the said bank to return the same to the said Wiltsie by the next mail. This affiant remained in Rochester until the next day when the mail arrived, and the said certificate having been delivered to him, paid the said sum of $500 therefor.

62 Affiant further says that since returning to Washington he applied to said Wiltsie for the copies of the correspondence between said Wiltsie and said King relative to the redemption of said tax-certificate, which copies said Wiltsie furnished to this affiant, copies whereof are attached to the answer of this affiant and marked "Exhibit Cohen No. 2."

Affiant further states that every averment, suggestion, insinuation and intimation in the said bill to the effect that there exists or existed any agreement, understanding or arrangement, expressed

or tacit or otherwise, between the said Kennedy and this affiant, or the said Webb and this affiant, or this affiant's clients and said Kennedy or said Webb, or any of them, with reference to the acquisition of said tax certificate and the use to be made thereof, are wholly and utterly false, and that at no time from the moment when this affiant first learned that the taxes were in arrears upon said property up to the present has any agreement, expressed or tacit, existed with respect to said tax certificate or the tax-title obtained thereunder, and that this affiant has never in any form or manner stipulated not to use the said tax-title adversely to the said Marianne A. B. Kennedy or the said Webb, or in any way restricted his rights or those of his clients with respect to the use of said tax certificate or tax-title.

Affiant's clients did authorize their counsel, William G. Johnson, subsequently engaged by them at the suggestion of this affiant, to propose a compromise of their claims under said tax-title to said Webb, and this affiant was present when the said proposition
63 was made and the same is correctly set forth in the affidavit of the defendant, Louis Kann, and the answer of the defendants Kann herein.

As to the averment in said bill relating to the interview on the 4th day of October, 1901, between this affiant and the counsel for complainant this affiant says that he did not say that he had bought the tax deed thinking that it might help him "to force the Kings to give up their lease," nor did he say that he knew that "he could easily make a lease with Mrs. Kennedy," but affiant said in answer to the question of said counsel as to why affiant had purchased the tax title that affiant believed it would help him in negotiating with King for the leasehold.

MYER COHEN.

Subscribed and sworn to before me this 16th day of April, 1902.

OSCAR LUCKETT,
Notary Public, D. C.

[SEAL.]

64 *Joint and Several Answer of Sigmund Kann et al.*

Filed April 18, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING, Complainant,
vs.
MARIANNE A. B. KENNEDY ET AL., Defendants. } No. 22834. In Equity.

The joint and separate answer of the defendants Sigmund Kann and Louis Kann to the original bill and to the bill of revivor of Caroline King.

1 & 2. Answering the first and second paragraphs of the original bill, these defendants admit the averments of fact contained therein to be true.

3. Answering the third paragraph of said original bill, these defendants say that they have no personal knowledge of the facts therein averred, but they are informed and believe, and therefore aver, that the said Marianne A. B. Kennedy and the said Henry King, Junior, the husband of complainant, did enter into an agreement of lease for the premises known as No. 715 Market space in the city of Washington, District of Columbia, a correct copy whereof is filed with said original bill as "Exhibit A," to which these defendants refer for the true statement of the terms thereof and of the several renewals thereof.

The true construction and interpretation of the terms of said lease and the rights of the parties thereunder, they are advised, are questions of law, as to which they are advised they are not required to make further answer than to say that the said lease was forfeitable by the lessor upon the failure of the lessee to perform the covenants on the part of the lessee to be observed and performed.

4. Answering the fourth paragraph of said original bill, these defendants say that they are informed and believe that the averments of fact therein contained are true.

5. Answering the fifth paragraph of said original bill, these defendants say that they have no personal knowledge as to the facts therein set forth, and, if material, they demand strict proof thereof. These defendants are informed and believe, and therefore, upon such information and belief, aver, that the said Henry King, Jr., in his lifetime did not pay all the taxes on said premises, as required by said lease, but that, on the contrary, he paid none of the taxes by him agreed to be paid, and that the said Marianne A. B. Kennedy was compelled to pay and did pay all the said taxes during his tenancy. And these defendants, upon information and belief aver that

the complainant, since the death of said Henry King, Jr., has not paid the taxes as required by the lease, with the single exception set out in said paragraph, but, on the contrary, made other and several defaults in payment of said taxes, and she and her husband also violated, and she continues to violate, other covenants and stipulations in said lease.

6. Answering the sixth paragraph of said original bill, these defendants say that, on the 13th of April, 1899, a sale was made of the property named in the bill for the unpaid installment of taxes for the year ending June 30th, 1898, but these defendants deny that it was an attempted sale, or that the purchase of said property was a pretended one, but, on the contrary, aver that the sale was an actual and consummate sale, and that the purchase was real and not pretended, the entire purchase-money having been paid by said C. H. Wiltsie to the District of Columbia, and a certificate of said purchase having been regularly issued to him therefor by the collector of taxes of the District of Columbia.

These defendants admit that the amount of said sale was $143.83, and that the property sold is worth a large sum of money; they are not, however, advised of its exact value, and are advised that its exact value is not material in this cause.

These defendants do not admit the averment that the complainant was not aware of the said tax sale until the month of July, 1901, and, if material, demand strict proof thereof. These defendants are informed and believe, and therefore aver, that in the month of May,

65 1901, the complainant paid other taxes on the said property, by her permitted to remain unpaid and in default at that time, and for part of which said property had been sold at a second tax sale to said C. H. Wiltsie; and these defendants are informed and believe, and therefore aver, that at that time and prior thereto the complainant knew of the previous sale of said property, and her reason for not redeeming the same was not because of ignorance on her part, but because it had become irredeemable under the law and it was known to the complainant that C. H. Wiltsie was the holder of the tax-sale certificate and from past experience in dealing with him for the redemption of tax sales that he would demand a bonus in addition to the taxes and penalties for the surrender of the same.

7. Answering the seventh paragraph of said original bill, these defendants say that they have no personal knowledge as to the averments thereof, and cannot admit the same, and, if material, demand strict proof thereof; but these defendants are informed and believe, and therefore aver, that the allegations of fact contained in said paragraph are untrue.

8. Answering the eighth paragraph of said original bill, these defendants say that it is true that they are merchants carrying on business under the name of S. Kann's Sons & Co., and that it is true that among the various businesses conducted by them is the business of millinery and cloaks. Upon information and belief these

defendants admit that the complainant conducts the business of millinery and cloaks in the premises occupied by her, which, they are advised and believe is in violation of the covenants in the lease to her, restricting the nature of the business permitted to be conducted by her in the said premises, but they are not advised that such violation of the terms of her lease constitutes a right in the complainant material to her interests in this cause.

Further answering said paragraph, these defendants say that it is true that in the month of September, and on either the 19th or 20th day of said month, as nearly as they are able to fix the date that one Charles H. Knight, called at the place of business of these defendants and notified them that the taxes on the premises No. 715 Market space were in arrears and that the property had been sold for the same. These defendants have no knowledge as to the particular business of said Knight, or whether he is a specialist in the matter of taxes and tax sales, and have no further knowledge concerning said Knight, since these defendants never had any transaction with him and never met him, except on the occasion referred to. These defendants positively deny the allegation that on said occasion, or at any other time, the said Knight advised these defendants that the said tax sale was irregular, or illegal, or could be avoided, or that the said Knight gave these defendants any advice whatsoever; and these defendants never sought any advice from the said Knight on the subject, and the communication made to these defendants by said Knight with respect to said property was confined to his statement of the fact that the taxes thereon were in arrears and that the property had been sold therefor. These defendants were not informed by said Knight as to what taxes were in
66 default, nor the amount thereof, nor the time of sale of said property, nor any other matter or thing in connection therewith, save the bare fact of a default and sale, and these defendants sought no information, knowledge or advice from said Knight.

Further answering said paragraph, these defendants say that it is untrue that they referred said Knight to Marianne A. B. Kennedy as the owner of the property, but that the whole transaction, so far as these defendants and the said Knight are concerned, consisted simply in this, that, upon the said Knight informing these defendants that the premises No. 715 Market space had been sold for default in payment of taxes, these defendants informed said Knight that they were neither owners nor tenants of said premises and that he said Knight, should communicate with Mr. Henry Randall Webb, whose address they communicated to said Knight, the said Webb being the representative of the owner of the said premises. And these defendants say that they never at any time, before or since said interview with said Knight, held any communication or intercourse with said Knight on any subject whatsoever.

Further answering said paragraph, these defendants say that, on the same day that said Knight made his said visit to these defendants, or the day following the defendant Louis Kann, to whom the

said Knight made his communication, met the defendant Meyer Cohen at luncheon in accordance with a custom which had subsisted for many months and informed said Cohen of the fact of said Knight's visit and of his communication. These defendants did not at that time suggest that said Cohen take any steps with respect to said tax sale, and the said Cohen made no suggestion to these defendants, and the subject was never mentioned by these defendants to said Cohen, or any one else, and was never mentioned by said Cohen to these defendants, and nothing was ever done or said by these defendants, or by any one by their authority or with their knowledge, with respect to said premises, or the tax sale thereof, until on the thirtieth day of September following.

These defendants have no knowledge as to the averments of fact contained in said paragraph as to the alleged interview between said Knight and said Webb, or between said Webb and his client, Marianne A. B. Kennedy, and, if material, demand strict proof of the same; nor have these defendants any personal knowledge of the interview alleged to have taken place between the defendant Webb and the defendant Cohen, and, if material, they demand strict proof thereof. These defendants say that on September 30th said Cohen enquired of these defendants whether they would be willing to lease the said premises No. 715 Market space and pay therefor the sum of three hundred dollars per month, saying he did so at the instance of said Webb and these defendants authorized said Cohen to inform said Webb that they would lease said premises on the terms stated and that he, said Webb, might so report to his client, Marianne A. B. Kennedy, provided, however, that possession of said premises should be given to these defendants and that their offer should not be used merely as a means of compelling the Kings to pay a higher rent.

67 Further answering said paragraph, these defendants say that the allegation in said paragraph, to wit, that "at a conference held between the said defendant Cohen and the said defendants Kann over a proposal that the said Cohen in his own name, but in reality as the agent of the said Kanns should purchase of the said Wiltsie the said tax title and hold the same, and thereby be in a position the better to aid in enforcing the forfeiture of the complainant's lease for the benefit of the said Kanns, the latter told the former that they had doubts whether it would be right for them to buy the tax title, but that if he, the said defendant Cohen, purchased it, they, the said defendants Kann, would stand by him in the transaction," is false; and that the true facts are that, on the thirtieth day of September, 1901, the said Cohen informed these defendants that the said tax sale, of which they had been previously informed by said Knight, as hereinbefore set forth, was by reason of lapse of time, irredeemable, and that, in the opinion of said Cohen, who was and is the general counsel of these defendants, it might be advantageous to these defendants to acquire and own the same. The said defendant Cohen did not explain in what particular manner these

defendants might derive advantage from the ownership of said tax-sale certificate, nor state what use should or could be made of the same; and these defendants especially deny that said Cohen, or any one advised them, or that they knew or supposed, that said tax-sale certificate could or would be used as a means to enforce the forfeiture of the lease to complainant. These defendants did not, on that occasion or any other occasion, express any doubt as to whether it would be right or not for them to buy said tax-sale certificate, and never had any doubts on the subject, as they were informed by said Cohen, when he suggested the purchase of said tax-sale certificate, that such tax-sale certificates were, by law, made negotiable, and that the purchase thereof was entirely lawful and proper. These defendants had no knowledge of the character of such tax-sale certificates, and no knowledge or opinion as to the provisions of the tax laws of this District, and having never purchased a tax-sale certificate nor had any dealings with reference to tax sales in this District, they expressed to said Cohen a doubt as to the business expediency of purchasing said tax-sale certificate, because of the fact that it involved the expenditure of money and because no definite purpose or object in owning the same was disclosed or suggested by said Cohen, who stated to these defendants that he merely advised its purchase because he believed that it might be advantageous to them to own it, and might aid them in acquiring possession of said premises. Upon such advice of said Cohen, and without any knowledge, opinion or suggestion as to the particular use which was to be made of said tax-sale certificate, except that it might be a means of securing possession of the premises sold, these defendants authorized the said Cohen to purchase the same and agreed to pay the costs of such purchase, which these defendants did.

68 Further answering said paragraph, these defendants say that they have no knowledge of what took place between the said Cohen and the said Webb, and if material, they demand strict proof of the averments of said paragraph with reference thereto. These defendants have no personal knowledge as to the allegations in said paragraph relating to said Cohen's trip to Rochester, nor as to the tax-sale certificate being at that time at the Central national bank in this city, nor have they any knowledge as to what complainant would have done had she been informed that said Cohen was going to Rochester to purchase said tax-sale certificate, and if material, they demand strict proof thereof. But these defendants are advised, and therefore aver, that it was immaterial to the interests of Mrs. Kennedy whether the said tax-sale certificate was owned by said Wiltsie, or said Cohen, or by any other person, because, in whosesoever hands it was, it was a lien upon said property, by which the title of the said Mrs. Kennedy was and is imperilled, wholly through the default of said complainant, who had ample opportunity to pay the same, but willfully failed and refused to do so.

Further answering said eighth paragraph of said original bill, these defendants say that they have no knowledge as to what was

contemplated by the said Marianne A. B. Kennedy with reference to the purchase of said tax-sale certificate by said Cohen, and, if material, they demand strict proof thereof; but they are informed and believe that said Marianne A. B. Kennedy had no knowledge of the proposed purchase of said tax-sale certificate, or that the same could or would be purchased by any one, until after the third day of October, 1901, and therefore it is impossible that she could have contemplated anything on the subject.

But these defendants say that the averment in said paragraph that it was not contemplated by these defendants that the said tax-sale certificate should be purchased for the purpose of using the same adversely against Mrs. Kennedy or to endanger her title, is absolutely false, and that it was the purpose of these defendants in acquiring the same to us- it adversely against Mrs. Kennedy and any and all persons whomsoever, and wholly and exclusively for the interest and advantage of these defendants in every way in which it could lawfully be of advantage to them.

Further answering said eighth paragraph of said original bill, these defendants say that the averment made therein that an agreement or understanding, express or tacit, existed between these defendants and the said Marianne A. B. Kennedy, or any one representing either of them, that the said tax title should be used only in furtherance of a common design to have the lease of the complainant forfeited by reason of her omission to pay the tax in question and dispossess her and have these defendants enter upon said premises as tenant of the said Marianne A. B. Kennedy, at an increased rental, is absolutely false and has no foundation in fact whatsoever. Neither of these defendants ever entered into any agreement or understanding, express or tacit, with, or in any way or at any time gave any intimation to, the said Marianne A. B. Kennedy, or to said Webb, or to any one representing her
69 or either of them, and never authorized any person whomsoever to enter into any agreement or understanding or to give any intimation, that the said tax title should be purchased or held or used for the purpose stated in said bill, or for any other purpose whatsoever. These defendants say that the only intimation, announcement or statement as to their purposes or designs as to the said tax title authorized to be given, or ever given, to any person whomsoever, was, first given on the ninth day of October, 1901, by the counsel of these defendants to said Webb, who was distinctly and in terms informed that the said tax title would be held and used by these defendants adversely to said Kennedy and to all persons whomsoever, and that these defendants insisted either upon the surrender of the possession of, and fee-simple title to, said property under their tax deed, or to a settlement of their claim of right thereto upon terms dictated by them. And these defendants further aver that there has never been, from the time when they were first acquainted with the existence of said tax-sale certificate up to the present time, any agreement, understanding or arrangement, of any

sort whatsoever, between these defendants, or any one representing them, and the said Marianne A. B. Kennedy, or the said Webb, or any other person, in any respect qualifying or variant from the legal right of these defendants to insist upon the validity of said tax title and to enforce the same against any and all persons whomsoever.

These defendants have no personal knowledge of the other averments contained in said eighth paragraph of said original bill, and, if material, demand strict proof thereof.

9. Answering the ninth paragraph of said original bill, these defendants say that the averment therein that the defendants now claim that an agreement existed between them to the effect that, if the defendant Kennedy will, by all means in her power, enforce the said forfeiture, and if she succeeds therein, lease the said premises to said defendants Kann, the latter will not seek to enforce the tax title against her, but that, if she shall not so insist upon the said forfeiture, then the defendants Kann will set up an adverse title against her, is false. These defendants do not now claim, and never have claimed, that an agreement as set forth exists, or ever existed, between these defendants and the said Kennedy, or any one representing either of them; but, on the contrary, these defendants aver that no agreement of any sort exists or has existed between these defendants and the said Kennedy or said Webb, or any of them, or any one representing any of them; and that the fact with respect thereto is this, that, on the ninth day of October, 1901, the counsel of these defendants informed the defendant Webb that the tax title acquired against the property would be asserted and enforced against his client, Mrs. Kennedy, unless she would give them possession under a long lease at an agreed rental, and that these were the only terms upon which they would compromise their claim of right to the premises in fee-simple, and that unless his client would give them such lease, she must defend her title against the said tax
70 deed at her peril; and these defendants are now at liberty to enforce said tax title, and the defendant Webb is at liberty to resist the same, or to institute proceedings for the defeat of said tax title, as he may be advised; and that there has never been a time when these defendants and the said Kennedy and Webb were not at liberty to proceed each against the other, as aforesaid. These defendants merely proposed as a compromise of their claim, possession of the premises under a long lease, which the defendant Webb is at liberty to accept or reject as he may be advised, but the consequent peril of losing the fee-simple estate in said property under the tax deed as aforesaid.

These defendants have no personal knowledge of the other matters and things set forth in the said ninth paragraph of said original bill, and, if material, demand strict proof thereof.

11. Answering the eleventh paragraph of said original bill, these defendants say that they have no personal knowledge of the facts therein averred, and cannot admit nor deny the same, and, if material, they demand strict proof thereof.

Further answering said paragraph, these defendants say that they are informed and believe, and therefore aver, that the parcels of land in said paragraph mentioned are covered by the lease to the complainant; that the most of said land is occupied by the said building No. 715 Market space; and that a small strip in the rear for the admission of light and air is inaccessible except through said premises No. 715 Market space, and is, and has been, used by the lessee of said premises under said lease, and is, and has been used in connection with said premises and as a part thereof by the complainant and her predecessor during the entire lease and by the owner ever since said building was constructed.

12. Answering the twelfth paragraph of said original bill, these defendants say that they have no personal knowledge of the facts therein set forth, and, if material, demand strict proof thereof; but these defendants are informed and believe, that said Dr. Henry D. Fry has unequivocally denied to counsel that he ever made any communication to the complainant of any sort whatsoever with respect to this matter.

13. Answering the thirteenth paragraph of said original bill, these defendants say that they have no personal knowledge of the matters therein averred, and cannot admit nor deny the same, but, if material, they demand strict proof thereof; and upon information and belief these defendants state that on the thirtieth day of October, 1901, the said Marianne A. B. Kennedy was represented by Henry Randall Webb, as counsel, and that he exclusively was authorized to act and speak for her, and that on the day mentioned Dr. Henry D. Fry expressly disclaimed any authority to act for or represent Mrs. Kennedy and stated that he could not interfere with the authority of her counsel Mr. Webb, to whom Mrs. Kennedy had committed the care and protection of her interests. That on said occasion said Dr. Fry stated to counsel for these defendants that, in his opinion, litigation would be hurtful to the health of said Marianne A. B. Kennedy, who was his patient, and for that
71 reason he desired to avoid, if possible, the litigation between her and the complainant, and his purpose in seeing counsel was to ascertain if the litigation could be avoided. These defendants are advised and believe, and therefore aver, that the statements of said Dr. Fry are irrelevant and immaterial to this cause, and they are informed and believe that the action of Marianne A. B. Kennedy in insisting upon the forfeiture of said lease and demanding possession of said premises were her free and voluntary acts, under the advice of her counsel, with full knowledge of all the circumstances, and strictly in pursuit of her own rights in the premises, and with the concurrence and approval of her physician and friend the said Dr. Fry.

14. Answering the fourteenth paragraph of said original bill, these defendants say that the statements therein to the effect that the said Marianne A. B. Kennedy instituted a landlord and tenant proceeding against the complainant under pressure and menace

brought to bear on her, is false. That the institution of said proceeding was her free and voluntary act, and that the complaint for the same was signed by her in the presence of and with the concurrence, approval and advice of her physician and friend, the said Dr. Fry, and with the advice of her counsel; and these defendants say that neither of them ever saw or communicated with Mrs. Kennedy at any time, and that neither of their counsel saw or communicated with her at any time, nor did any one in their behalf, and that the only person other than her own counsel and her physician and friend, Dr. Fry, who attempted any communication with her on this subject, was the complainant through her counsel.

15. Answering the fifteenth paragraph of said original bill, these defendants are advised and believe, and therefore, aver, that it is not competent for this court in this proceeding to enquire into the validity of the tax sale and deed to the defendant Cohen made thereunder, and they claim the same benefit and advantage of this objection as though they had expressly demurred to the bill therefor; but these defendants deny that the said proceedings for the sale of the property for default in the payment of taxes for the second installment of the year ending June 30th, 1898, are irregular, defective, illegal or void, in any respect, and they assert that the same are regular, effective, legal and valid in every particular required by law.

Further answering said paragraph these defendants say that, as to the matters set out in subparagraph "*a*," the law provides that the property of a deceased person until divided shall continue to be assessed in the name of the deceased, and that the premises in question were a part of the property of one Maria T. Gillis, long since deceased, and that the property of the said Maria T. Gillis, deceased, had not been divided at the time of said tax assessment, and that said property was therefore properly assessed in the name of said Maria T. Gillis.

As to the averment of subparagraph "*b*," these defendants say that it is untrue that no report of said tax sales was made and signed by the collector of taxes within twenty days after the last
72 day of sale, but that the same was duly made and filed with the recorder of deeds, as provided by law, and was and is signed by the collector of taxes, E. G. Davis. These defendants are informed and believe that said report is also signed by the persons named as Commissioners of the District of Columbia, but they are advised that the addition of the names of the Commissioners of the District of Columbia is merely superfluous and cannot have the effect of obliterating the signature of the collector of taxes, who makes and signs said report.

These defendants have no knowledge as to the allegations in said subparagraph "*b*" relating to the place and manner of record of said report of the collector of taxes, but they are advised, and therefore aver, that the law does not require the said report to be recorded by the recorder of deeds, but merely to be filed in his office, and no

record, perfect or imperfect, can affect the validity and accuracy of the original report, accurately and duly made as required by law, and filed with the recorder of deeds.

Answering subparagraph "*c*," these defendants say that said report does state the taxes due upon said property.

Answering subparagraph "*d*," these defendants deny that said report omits to state the amount paid for said property, but say that said report does state in distinct terms the amount paid.

Answering subparagraph "*e*," defendants deny that said report omits to state the date of sale of said property; and these defendants say that said report does state the date of sale of said property as April 13, 1899.

Answering subparagraph "*f*," these defendants deny that the said report does not set forth the costs of sale; but aver, on the contrary, that said report does set forth such costs.

Answering subparagraph "*g*," these defendants deny that said report fails to state to whom the property was sold; but, on the contrary, they aver that said report does state to whom said property was sold.

Answering the averments of subparagraph "*h*," these defendants say that they have no personal knowledge thereof, and, if material, demand strict proof thereof; but these defendants are advised that the time of payment by the purchaser at said tax sale is immaterial.

16. Answering the sixteenth paragraph of said original bill, these defendants say that, as to the matters of law therein set up, they are advised that the complainant is in error, and they deny the accuracy thereof. As to the only matters of fact therein set up of which these defendants have any knowledge, they say that the statement that these defendants, or either of them, was ever informed by or through the said Charles H. Knight that the said tax sale was invalid by reason of failure to advertise the same in the name of the owner, or for any other reason, is false, and these defendants repeat that the said Knight never gave them any other information except that said property had been sold for the none-payment of taxes, and never gave them any information or advice, and they never sought any, on the subject.

73 Further answering, these defendants are advised that, even had said Charles H. Knight given such advice, his advice or opinion was not conclusive in the premises, especially in view of the fact that these defendants are informed and believe, and therefore aver, that said Charles H. Knight has himself purchased and held for sale under claim of validity tax-sale certificates subject to the very criticism pointed out in said sixteenth paragraph of the original bill.

Further answering said original bill, these defendants are advised and believe, and therefore aver, that the right of said Marianne A. B. Kennedy and of her devisee Webb to insist upon the forfeiture of said lease for the non-payment of taxes in nowise depends upon

the opinion of Mr. Knight as to the validity of any tax sale, nor upon the validity in fact of any such tax sales; but depends entirely upon the non-performance by the complainant of the covenants in the lease on the part of the complainant to be performed, and default in the performance of which is made cause of forfeiture by the terms of said lease.

These defendants are further advised and believe, and therefore aver, that the question whether or not the complainant has incurred a forfeiture of her lease, or whether or not the defendant Webb, as devisee of Marianne A. B. Kennedy, has the right to enforce the same, are matters with which these defendants have no concern, and are wholly between the complainant and said defendant Webb, and that the question whether or not the tax deed to the defendant Cohen is valid and passes title to said Cohen is a matter wholly between said Cohen and said Webb, with which the complainant has no concern, and that in uniting the said subjects-matter in said bill of complaint, the said cause is made multifarious, and these defendants claim the same benefit of objection to said bill as if they had demurred thereto expressly therefor.

Further answering said original bill, these defendants say that they are advised and believe, and therefore aver, that this court is without jurisdiction to decree as between these defendants and their codefendant Webb as to the validity of said tax title at the instance of the complainant, and this court cannot grant any effective relief as between these defendants and their codefendant Webb upon the bill of the complainant; and that the fee-simple title to the said premises is not a matter in which the complainant as tenant for years has any interest or right; and that this court is without jurisdiction or power at the instance of complainant to enjoin these defendants from suing their codefendant Webb in an action at law, and these defendants claim the same benefit of this objection to said bill as though they had demurred to the same therefor.

17. Answering the bill of revivor herein, the defendants say, in answer to the first and second paragraphs thereof, that the averments therein contained as to the contents of said original bill and the proceedings thereunder are substantially correct.

18. Answering the third paragraph of said bill of revivor, these defendants, upon information and belief, say that the averments thereof are substantially correct, save as to the averments
74 relating to the amount and value of the estate of the testatrix and as to her sole heir-at-law. As to these facts these defendants are without knowledge, and cannot admit nor deny the same, and, if material, they demand strict proof thereof.

19. Answering the fourth paragraph of said bill of revivor, these defendants say that the facts therein stated are true; but that the averments of matters of law, these defendants are advised, are incorrect, and they are advised that said defendant Webb is entitled to the possession of all estate, real and personal, belonging to said Marianne A. B. Kennedy at the time of her death.

20. Answering the fifth paragraph of said bill of revivor, these defendants say that they are informed and believe that it is true that the said defendant Webb will prosecute proceedings for possession against the complainant, unless restrained by this court, but these defendants deny that there is any ground for enjoining him in said proceedings, and they deny that the complainant is threatened with a multiplicity of suits through the defendant Maria Gillis Dewey, or otherwise.

And having fully answered the said original bill and the bill of revivor herein, these defendants pray to be hence dismissed with the reasonable costs in this behalf sustained.

SIGMUND KANN.
LOUIS KANN.

Witness:
CHARLES F. ROBERTS.

W. G. JOHNSON,
MYER COHEN,
Sols. for Defendant- Kanns.

We do solemnly swear that we have read the annexed and aforegoing answer by us subscribed, and know the contents thereof, and that the facts therein stated upon *are* personal knowledge are true, and that those stated upon information and belief we believe to be true.

SIGMUND KANN.
LOUIS KANN.

Witness:
CHARLES F. ROBERTS.

Subscribed and sworn to before me this 8th day of April A. D. 1902.

CHARLES F. ROBERTS,
[SEAL.] *Notary Public, D. C.*

75 *Affidavit of Louis Kann.*

Filed April 18, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING, Complainant,
vs.
MARIANNE A. B. KENNEDY ET AL., Defendants. } No. 22834. In Equity.

Louis Kann, being duly sworn, deposes and says that he is one of the defendants in this cause. That his firm, S. Kann's Sons & Co., occupies among other premises all of the stores on Market

space between Seventh and Eighth streets, except the premises at the corner of Seventh street, occupied by Saks & Co., and premises No. 715 Market space, occupied by the complainant in this cause. Two of the stores occupied by this affiant's firm are to the west of that occupied by the complainant and the others are to the east thereof. On or about the twentieth day of September, 1901, a man whom affiant had never before seen came into the place of business of affiant and introduced himself as Mr. Knight, and asked affiant if affiant was aware that one of the stores occupied by affiant's firm had been sold for taxes. Affiant stated that he was not aware of such fact, and the said Knight then informed him that premises No. 715 Market space had been sold for taxes. Affiant at the moment did not remember the numbers of the several premises occupied by his firm and walked out on the sidewalk with said Knight to see which were premises No. 715, and on observing that they were the premises occupied by the complainant, he informed said Knight that he, this affiant, did not occupy that store and had no interest therein, and affiant told said Knight that Mr. Henry Randall Webb, a member of the bar, was the counsel for, and represented the owner of said premises. Affiant then returned to his store and, upon being informed by said Knight that he did not know where Mr. Webb could be found, affiant consulted the city directory and informed said Knight of Mr. Webb's office address; whereupon said Knight departed. This affiant sought no information from said Knight, nor any advice with respect to the matter; and the said Knight gave this affiant no information or advice of any sort as to the validity or invalidity of said tax sale, or otherwise, beyond the mere information that the property had been sold for taxes. On the same or the next day, this affiant met the defendant Meyer Cohen, at luncheon as they were in the habit of meeting for many months, and casually mentioned to said Cohen the fact that said Knight had called at affiant's place of business and had informed affiant that the premises No. 715 Market space had been sold for taxes, and that he had referred said Knight to said Webb and had given him said Webb's address. Affiant did not discuss the matter with the defendant Cohen, nor did the defendant Cohen discuss it with
76 this affiant, and nothing was said further on the subject either by affiant or by said Cohen. This affiant never again spoke of the matter and was never spoken to about it, and never again referred to the subject in any way until the 30th day of September, when the defendant Cohen called at affiant's place of business and informed affiant that he, Cohen, had ascertained that the tax sale of premises No. 715 Market space had become irredeemable by lapse of time, and advised affiant that it would be advantageous to buy and control the tax-sale certificate. Said Cohen was unable to inform affiant of the amount necessary to purchase the same, and did not explain in what way the acquisition of said tax-sale certificate might be of advantage to affiant and his partner, but merely stated that in his, Cohen's opinion, it might be of assist-

ance to affiant and his partner in getting possession of the said premises No. 715 Market space, and that, in his, Cohen's, opinion, it was better that affiant and his partner should hold said tax-sale certificate than that it should remain in the possession of C. H. Wiltsie, in Rochester, New York, who said Cohen informed affiant was the owner thereof. Affiant and his partner both expressed some doubt as to the business expediency of investing money in a tax-sale certificate without more definite knowledge of the use which was to be made of it and the specific advantage which would accrue from its ownership, but, upon the assurance of said Cohen that, in his judgment, it was advisable that they should own and control said tax-sale certificate, affiant and his partner authorized said Cohen to purchase the same and agreed to pay the cost thereof. Neither this affiant nor his partner at that time, nor at any other time, had any agreement, arrangement or understanding, of any sort whatsoever, with Marianne A. B. Kennedy, the owner of said property, nor with said Webb, with reference to the purchase of said tax-sale certificate or the use which was to be made of the same, and the only understanding that this affiant and his partner had with reference thereto was that its acquisition was wholly and entirely for the benefit of this affiant and his partner and that it was to be used for their sole and exclusive benefit in any and every lawful way which might be to their advantage; and neither this affiant nor his said partner has since that time entered into any arrangement, or authorized any one else to enter into any arrangment, with any one with respect to the use of said tax-sale certificate, otherwise than for the exclusive benefit of this affiant and his partner, and the only concession which this affiant or his partner have ever made with respect to the ownership and control of said tax-sale certificate was made through the authority of this affiant and his partner, by their counsel, who was authorized on the ninth day of October, 1901, to say to said Webb that, if Mrs. Kennedy would give possession of said premises to this affiant and his partner under a long lease, they would release the title acquired by them under said tax sale without further question, but that, if she refused so to do, they would insist upon their legal rights under the tax title, even to the extent of recovering the possession and fee-simple title of the property there-
77 under. At the time of the purchase of said tax-sale certificate this affiant had never received any intimation or suggestion from any source that said tax sale was in any respect irregular or defective, and before authorizing the making of the proposition, above mentioned, to said Webb, affiant consulted counsel other than said Cohen, at the suggestion of said Cohen, and this affiant and his partner were advised by said counsel that, in his opinion, said tax sale was regular and valid, and that a deed thereunder could be enforced against the property. Affiant and his partner were further advised by said counsel that the said tax deed could not be enforced without litigation, which would take time and would be expensive, and that the result of such litigation could not, of course, be guar-

anteed, and that their title might be defeated, and that, in the opinion of said counsel, it would be wiser to compromise their claim with the owner of the property, than to seek to enforce it absolutely; and said counsel suggested that, if affiant and his partner could obtain from the owner a satisfactory lease of said premises, it would be wiser to accept the same, and, in consideration of said lease, surrender up the tax title; and said counsel further advised this affiant and his partner that, in his opinion, any counsel whom the owner would consult would advise her that it was to her interest to compromise the tax title on such terms, in preference to imperilling her entire estate, and in any event being subjected to the anxiety and expense of a lawsuit; and it was upon such advice that affiant and his partner authorized said counsel to make the proposition, above stated, to said Webb.

LOUIS KANN.

Witness:
CHARLES F. ROBERTS.

Subscribed and sworn to before me this 8th day of April, A. D. 1902.

[SEAL.] CHARLES F. ROBERTS,
Notary Public, D. C.

Answer of Henry Randall Webb.

Filed April 18, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING, Complainant, vs. MARIANNE A. B. KENNEDY ET AL. } In Equity. No. 22834.

The answer of Henry Randall Webb to the bill of complaint against him and others in chancery exhibited.

In answer to so much of the original bill of complaint as defendant is advised it is necessary for him to make answer, both for himself and as devisee and executor of Marianne A. B. Kennedy, this defendant respectfully says:

78 1, 2, & 4. That he believes that the allegations of fact, in the first, second and fourth paragraphs of said bill are substantially correct.

3. Answering the third paragraph, this defendant admits the averments of fact therein to be correct, but as to the terms of said lease and its true interpretation he is advised are questions to be determined from the said instrument of lease itself, to which he refers

for accuracy, and he is advised that the said Exhibit A of the complainant's bill is a true copy thereof.

5. That it is not true, as alleged in the fifth paragraph of said bill, that Henry King during his lifetime fully and faithfully complied with each and every of the terms of the said lease, but to the contrary respondent is informed and believes and so believing avers that said Henry King, Jr., did not, from October, 1890, when said lease began, until August, 1897, when he died, pay any of the taxes or assessments levied against this property, as he had covenanted to do in the said lease, and on the contrary the said Marianne A. B. Kennedy was compelled to pay and did pay all the said taxes, amounting to about $2,500, notwithstanding the positive covenant of the said lessee to pay the same, and this defendant is informed and believes and therefore avers that the said lessee and the complainant otherwise violated the covenants of said lease, and the complainant still continues to violate other covenants of said lease. That since the death of Henry King, Jr., and prior to October 1st, 1901, the complainant, as your respondent is informed and believes made three payments of taxes on certain parts of this property, to wit: On December 31, 1897, she paid the taxes for the first half of the year 1898 on part of said property; that on the 24th of July, 1900, she paid the taxes due upon part of said property for the year ending June 30, 1900; and on May 24, 1901, she paid taxes on part of said property for the year ending June 30, 1901, and also certain other taxes theretofore permitted to be in arrear, including the redemption from a tax sale of the said lot A, for which the said property had been sold in the spring of 1900. As to whether the reasons which prevented the complainant from paying the taxes for the second half of the year ending June 30, 1898 are truly stated in said paragraph, respondent, from want of knowledge, can neither admit nor deny, but if material he demands strict proof thereof.

6. Answering the sixth paragraph, this respondent admits that sublot A was sold for taxes on the 13th of April, 1899 and purchased by one C. H. Wiltsie for the sum of $143.83, being the tax for the second half of the year ending June 30, 1898 upon said sublot A. This respondent is informed and believes that the said tax sale was an actual one and that the purchase thereof by said Wiltsie was actual. This respondent does not admit that the said tax sale is valid, but he denies the right of the complainant to challenge the validity of said sale in this proceeding or to compel this defendant to litigate that question in this proceeding, and he is advised and believes and therefore avers that he has the right as the devisee of the estate to settle the question of the validity of said tax sale in

79 such manner as in his discretion may be best, with or without litigation, and in such form of procedure as he may be advised is best adapted to preserving the interests of the parties entitled to said property and the title of this respondent as devisee thereof, and that he cannot be compelled to raise any questions, or

litigate the same, with respect to said tax title, and thereby jeopard the interests of said parties at the instance of the complainant, and he claims the same benefit and advantage of this objection as though he had demurred to the said bill therefor.

7. Answering the seventh paragraph, this respondent says that he has no personal knowledge of the correspondence between the complainant and the said Wiltsie with reference to the said tax-sale certificate, and if material demands strict proof of the averments with reference thereto, but he is informed and believes and therefore avers that it is untrue that any negotiations were pending between the complainant and the said Wiltsie for the redemption of said tax sale until the 21st day of September, when the complainant, through her representative, made an offer to the said Wiltsie which the latter declined and responded with a counter-offer which this defendant is advised the complainant never accepted or acted upon, and this defendant is advised and believes and therefore avers that it is immaterial whether the complainant was engaged in any such negotiation as alleged or not, since it was the duty of the complainant to have paid said tax, and immediately upon discovery of the fact of said tax sale to have redeemed the said property at any cost, without imperiling the title of the lessor in said property.

8. Answering the eighth paragraph of said bill, this defendant has no personal knowledge of the alleged communications between the said Charles H. Knight and the defendants Kann, but defendant says it is true that on the afternoon of the 25th of September the said Knight called upon this defendant and represented that the said property had been sold for taxes and that he, said Knight, knew the facts which would enable him, said Knight, to have the said tax sale cancelled as invalid, and sought to be employed by this defendant in behalf of the said Kennedy upon a contingent compensation, to institute proceedings for the cancellation of said tax sale. This defendant on the next day ascertained from the tax office that the representation of said Knight that the property had been sold for taxes was true and that the said tax sale was, by reason of lapse of time, irredeemable, and at the same time this defendant discovered that other taxes were due and unpaid on the said leased premises and that the property had been a second time sold for taxes to said Wiltsie and redeemed by the complainant in May, 1901. Thereupon, on said 26th day of September, 1901, this defendant informed his client, Mrs. Kennedy, of said facts and advised her that under the terms of the lease she had the legal right to declare said lease forfeited and terminate the same, or to assume the burden of having the said tax sale cancelled, if irregular, and this defendant advised his said client that in his opinion it was proper and in her interest that she should enforce the forfeiture of
80 said lease because of the non-payment of taxes by the complainant. This defendant did not on said occasion propose the lease of said premises to the defendants Kann or to any other person whomsoever. This defendant admits that it is true that on

the 30th day of September he called upon the defendant Cohen, the attorney of the defendants Kann, and inquired whether their said clients were still willing to lease said property at a rental of $300 per month and the payment of all taxes, as they had some months previously indicated their willingness to do, but this defendant says that such action on his part was not based upon "what he understood to be the wish and instructions of said client" as in said paragraph alleged, but upon what he knew and still knows to be the specific authority, direction and desire of his client. That thereafter and later in said day the said Cohen informed this defendant that his clients would lease said premises on the terms stated, provided they were given possession thereof and their said offer was not used as a means to compel the complainant to pay a higher rent. This defendant has no knowledge as to a conference between the said Cohen and his clients, the defendants, Kann, as alleged in said bill, and if material demands strict proof thereof.

Further answering said paragraph, this defendant says that after being advised by the said Cohen that his said clients would lease the said premises, he called upon his client, Mrs. Kennedy, and advised her of the fact, and thereupon, at the request of said client, this defendant called upon her physician and friend, Dr. Henry D. Fry, and informed him of the facts and of this defendant's advice to and decision by his client, Mrs. Kennedy, which the said Dr. Fry approved and expressed gratification that the said Mrs. Kennedy was going to terminate the lease with the complainant. That later in said day, at about six o'clock, on returning to his home, this defendant met the defendant Cohen standing on defendant's door-step, and the said defendant Cohen thereupon informed this defendant that the said Cohen was going to Rochester to buy said tax certificate from the said Wiltsie, and that he and the said Webb must now deal at arm's-length. This defendant objected to said Cohen's proposed action, but the latter insisted, and this defendant among other things objected that the said Cohen had no right to purchase said tax-sale certificate, because in doing so he would be taking advantage of information communicated to him by this defendant as to the fact of the said tax sale, to which the said Cohen replied that he had not received his information from this defendant but had known the fact long before through the defendants Kann, who had learned the fact from the said Knight, and sent said Knight to this defendant, which statement the said Knight subsequently, in conversation with this defendant, confirmed. The statement in said paragraph that this defendant entirely acquiesced in the project and course of said Cohen is utterly false. This defendant never, at any time or in any way, acquiesced therein, and so far as he said or did anything with respect thereto he objected to and opposed said Cohen's

81 purpose. This defendant was wholly unable to prevent the said Cohen from consummating his said purpose and therefore made no effort to do so. This defendant did not then know and did not learn until after the 3rd of October that the said tax

certificate was at a bank in this city, subject to redemption by the said complainant, but supposed that the same was in Rochester. This defendant does not know whether the said complainant would have taken steps to redeem the same if notified, but he denies that he owed any duty to the said complainant or that he was under any obligation to protect the interests of the complainant in any way, but that on the contrary, as between the complainant and his, this defendant's, client, he had the right and duty to pursue such course as in his judgment was most in the interest of his client, which course he did pursue and has pursued throughout this matter. And further answering, this defendant says that his client, Mrs. Kennedy, had no knowledge of said Cohen's purpose to buy said tax certificate until after said Cohen had acquired the same and obtained a deed thereunder. And further answering said paragraph, this defendant states that the averment therein that an agreement or understanding, expressed or tacit, existed between any of the defendants that the said tax title should be used only in furtherance of the common design to have the complainant's lease forfeited is an absolute and unmitigated falsehood, without any shadow of foundation in fact, and that no agreement, arrangement or understanding, expressed or tacit or otherwise, of any sort or description, ever existed between this defendant or his client, Mrs. Kennedy, and any person whomsoever, with respect to the acquisition and use of said tax certificate, and each and every averment, insinuation or suggestion in the bill of complaint to the effect that any such agreement existed is false. This defendant has no knowledge of the other facts in said paragraph alleged, and if material demands strict proof thereof, except that he is informed and believes that the deed from the Commissioners to said property, founded upon said tax title, was obtained promptly, but the same was obtained without the knowledge, connivance or consent of this defendant or his client and was unknown to him and his client until after the same had been obtained.

9. Answering the ninth paragraph, this defendant admits that the complainant on the last day of September sent a check for the rent to this defendant's client, Mrs. Kennedy, which she received on the first day of October, and on the same day this defendant's said client returned said check through the mail to the complainant with the letter, a copy of which is filed with the bill of complaint, the substance of which letter was explained to Mrs. Kennedy by this defendant, but which was wholly composed and written by her in the absence of this defendant. This defendant admits that the said letter did not advise or inform the complainant of the contemplated purchase of the said tax certificate, and this defendant states that it was impossible for his client so to inform or advise the complainant, as his client had no knowledge of such contemplated purchase by said Cohen until after the 3rd of October,
82 and it was not, therefore, in her power to give the complainant such information. It is true that this defendant informed the complainant's counsel on the 15th of October that he

had taken no steps to redeem or purchase said tax title from said Cohen, but did inform said counsel that that was a matter which he would take up and attend to after he had obtained possession of the premises and terminated the lease to the complainant. This defendant did not then consider nor does he now consider that it was any of the business of the complainant's counsel when or how this defendant should deal with the question of the tax title. This defendant does not recall having stated to the complainant's counsel that there was no danger of the defendant Cohen bringing ejectment proceedings for said premises, but may have so stated, as he did not apprehend such danger, having been theretofore and on the 9th day of October, offered by the counsel for the defendants Kann and Cohen what this defendant considered a very reasonable compromise, by which the tax title would be released, and which compromise this defendant believed he would be able to carry out. This defendant has no knowledge as to whether the defendants Kann now claim that any agreement such as in said paragraph alleged existed between the said Kanns and this defendant or the said Kennedy, but he does know that no such agreement does or ever did existed. This defendant has no knowledge of the averments in said paragraph as to the alleged conversation between the defendant Cohen and the counsel for complainant, and if material demands strict proof thereof.

11. Answering the 11th paragraph of said bill, this defendant admits that the correspondence as set forth in Exhibits D, E, F and G of complainant's bill took place, as also certain other correspondence hereinafter referred to and particularly set forth. Further answering said paragraph, this defendant says it is untrue that the said parts of said premises have never been treated or considered by the parties as covered by the lease, but on the contrary they are almost entirely covered by the building which the complainant occupies and are absolutely inaccessible except through said building and are used exclusively for said building by the tenant thereof and had been for very many years before the complainant or her predecessor in the lease ever had possession of said premises; that it is true that Mrs. Kennedy paid the taxes on said rear ground, but it is also true that at the time she paid the taxes on said rear ground she paid the taxes upon the entire demised premises, in forgetfulness of the duty of the complainant's predecessor to pay the same, and that when said Kennedy ceased to pay taxes upon the main part of said premises, she ceased to pay taxes upon any part of it and that her failure to pay taxes on said ground was not an inadvertence on the part of this defendant's client, but was simply the pursuit of her rights in the premises.

12. Answering the twelfth paragraph of said bill, this defendant denies that the said Kennedy, becoming more fully informed
83 or advised as to the transaction, was unwilling to proceed further with it and through Dr. Henry D. Fry informed the complainant that she did not consider it desirable or proper to insist

upon the forfeiture, and that she was willing to waive the same and to permit the complainant to continue under the terms of the lease, if such arrangement could be effected. This defendant has no personal knowledge of what the said Dr. Fry may have represented to the complainant, but he is informed by the said Dr. Fry that he, said Fry, never informed the complainant anything, and he was informed by the said Mrs. Kennedy that she never authorized the said Fry, or any one else, to make any such representation.

13. Answering the thirteenth paragraph of said bill, this defendant denies the facts therein stated and demands strict proof thereof, but he is advised and believes and therefore avers that the same are immaterial to the proceedings in this cause.

14. Answering the fourteenth paragraph, this defendant states that the averment that the said Marianne A. B. Kennedy instituted a landlord and tenant proceeding against the complainant under pressure and menace brought to bear upon her is absolutely false; that she brought the said proceeding voluntarily and without coercion, threats or menaces from any persons whomsoever, and that in doing so she acted under the advice of her counsel and of her friend and physician, Dr. Fry, in whose presence alone she signed the said complaint and to whom she delivered it for delivery to her counsel, this defendant.

15. Answering the fifteenth paragraph of said bill, this defendant is advised and believes and therefore avers that he cannot be compelled to litigate the question of the validity of said tax sale in this proceeding at the instance of the complainant, and that whether valid or invalid, this defendant has the right to deal with the same without reference to the views of the complainant, and to extinguish said tax title in such manner as in his judgment may be best. That this defendant can, without litigation and without expense, secure a release of said tax title and he is advised and believes that it is his duty to the parties in interest to obtain the extinguishment of said tax title by amicable compromise, without imperiling the fee-simple title to said property by litigation over a question of the validity of the same, which, if determined in favor of the validity of said tax sale, will forever extinguish the title of all parties to said property except the defendants Kann. This defendant has not been able to inform himself sufficiently as to the facts and the law to be able to say whether the said tax sale is valid or not, but he is advised and believes and therefore avers that under the statute the said tax deed is made *prima facie* evidence of the regularity of all proceedings for the sale of said property, and that in a litigation affecting the validity of said sale, the burden would be cast upon this defendant to establish this invalidity, and he denies the right of the complainant to compel this defendant to enter upon such litigation and take the consequences of the result thereof solely for the benefit of the complainant, through whose default, and only through whose default, the said tax title has arisen.

84 16. Answering the sixteenth paragraph of said bill, this defendant denies that the complainant has or ever had a right to be relieved from the forfeiture incurred by her failure to pay the taxes on said property, and on the contrary this defendant is advised and believes and therefore avers that relief from a forfeiture is a matter of favor in a court of chancery, and is never accorded in the case of a forfeiture resulting from the non-payment of taxes or like duty, and that if the said tax certificate had never been acquired in hostility to the owner of said property or had been redeemed by the complainant, this defendant would have the right, nevertheless, to insist upon said forfeiture, and this court would be without the right and jurisdiction to relieve the complainant therefrom. This defendant has no knowledge as to the alleged information given to the defendants Kann or Cohen, or any of them, by the said Charles H. Knight, but he is informed and believes that the averments in said paragraph are false, and that neither of the said defendants was given any such information as is therein set forth.

17. Answering the bill of revivor herein, this defendant says.

1 & 2. This defendant says that the averments of the first and second paragraphs of said bill of revivor are substantially correct, but that for the contents of the said original bill and the proceedings thereon he refers for accuracy to the bill and proceedings themselves.

3. Answering the third paragraph, this defendant says that it is true that the said Marianne A. B. Kennedy died on the 4th of December, 1901, leaving a will and codicil, which were duly admitted to probate on the 17th of January, 1902; that by said will the testatrix devises her entire estate to this defendant in fee, including the premises No. 715 Market space and including all the rights of the testatrix under said lease of premises No. 715 Market space, in trust to sell all of the said property and pay from the proceeds thereof certain legacies. This defendant is not able to state whether the amount of said estate will largely exceed in value the amount of said legacies, but this defendant is able to state that should the said tax title be maintained as valid and the said sublot A be lost to said estate, the said estate will not exceed the amount of said legacies, but will be very largely insufficient to pay the same, and for this among other reasons this defendant deems it of the highest importance that he should not imperil the estate of his testatrix by litigation touching the validity of said tax title, when he is able to secure an amicable compromise of the claims of the owners of the tax title without loss or injury to the said estate, which will be impossible if the question of said tax title is litigated even should the tax title be ultimately defeated, since the estate would be put to considerable expense in the way of costs and counsel fees in the litigation necessary to effect such defeat of said tax title.

Further answering said paragraph, this defendant says it is true that Maria Gillis Dewey is the sole heir-at-law of the said Mrs. Kennedy as to so much of her said estate as descended to the testatrix on the

part of her mother, but that a part of the said real estate de-
85 scribed in the lease and upon which the building thereon erected stands did not descend to the testatrix on the part of her mother and that as to such part the said Maria Gillis Dewey is not her sole heir-at-law nor an heir-at-law at all, but this defendant avers that the rights of the said Maria Gillis Dewey are not material to be considered or adjudged in this proceeding; that this defendant is devisee in fee and is entitled to the possession of said property and is the reversioner under said lease and as the legal representative of said testatrix is the only one authorized to maintain the landlord and tenant proceeding for possession of said premises under the forfeiture of said lease asserted by his said testatrix.

4. Answering the fourth paragraph of said bill of revivor this defendant says that the facts therein stated are true except as to the allegations with respect to the rights of said Maria Gillis Dewey, which this defendant says are matters of law as to which he is not required to make further answer than to deny the accuracy thereof and he is advised and believes and therefore avers that the said matters are not proper to be inquired of or decided by this court in this proceeding and are irrelevant and immaterial to any rights of the complainant and render her said bill of revivor multifarious, and he claims the same benefit of this objection as though he had demurred to the same therefor.

5. Answering the fifth paragraph, this defendant admits the averments of fact therein made to be substantially correct, except as to the averment as to the right of the said Maria Gillis Dewey, which this defendant is advised is matter of law and as to which this defendant is advised that the allegations in said paragraph are incorrect, and that the same are irrelevant and immaterial to the rights of the complainant in this cause, and he claims the same benefit of this objection as though he had especially demurred to the bill therefor.

And having fully answered, he prays to be hence dismissed, with his reasonable costs.

HENRY RANDALL WEBB.

JOHN SIDNEY WEBB,
ELISHA S. THEALL,
Solicitors for Defendant.

DISTRICT OF COLUMBIA, *ss:*

I do solemnly swear that I have read the answer by me above subscribed and know the contents thereof; and that the facts therein stated upon my personal knowledge are true, and those stated upon information and belief I believe to be true.

HENRY RANDALL WEBB.

Subscribed and sworn to before me this 16th day of April, 1902.

OSCAR LUCKETT,
Notary Public, D. C.

[NOTARY'S SEAL.]

86 (Ex. H. R. W. No. 1.)

Filed April 18, 1902.

Leon Tobriner, attorney-at-law, rooms 3, 4, 5, 6, 7, and 8, Equity bldg., 317–319 4½ street N. W. (near the city hall).

WASHINGTON, D. C., *October* 17, 1901.

H. R. Webb, Esq., Columbian building, city.

MY DEAR SIR: Referring to our conversation of last Tuesday the 15th inst., in relation to the tender of rent for premises leased by Mrs. King from Mrs. Kennedy, I suggested at that time that for the purpose of avoiding inconvenience to Mrs. Kennedy you have her address a letter to Mrs. King in our care, to the effect that it would be unnecessary to make tenders of any rent for the demised premises to accrue thereafter, inasmuch as they would not be accepted. You informed me at that time that you would consider the matter. Will you please advise me as to what conclusion you have reached and whether we will receive such a letter. I am investigating the matter of the taxes which in your letter of the 14th inst. you claim to have paid. It is a question whether these small portions assessed in the name of J. C. and M. A. B. Kennedy are a portion of the demised premises. I will acquaint you with the result of my search.

Very truly yours, LEON TOBRINER.

(Ex. H. R. W. No. 2.)

Leon Tobriner, attorney-at-law, rooms 3, 4, 5, 6, 7, and 8, Equity bldg., 317–319 4½ street N. W. (near the city hall).

WASHINGTON, D. C., *October* 22, 1901.

Henry Randall Webb, Esq., Columbian building, city.

MY DEAR SIR: When I saw you several days ago it was understood that you would let me hear from you with respect to the waiver of rents for premises #715 Market space, which in my letter I had suggested you should obtain from Mrs. Kennedy. You also at that time spoke about the terms of a new lease from Mrs. Kennedy to Mrs. King, and you then said you would also let me know the terms on which Mrs. Kennedy would execute such new lease, assuming that Mrs. King would surrender the old one.

I would be very glad to have a reply within the next few days on these subjects.

Very truly yours, LEON TOBRINER.

(Ex. H. R. W. No. 3.)

WASHINGTON, D. C., *Oct.* 22, 1901.

Leon Tobriner, Esq.

DEAR SIR: Replying to your request, that I inform you upon what terms, my client Mrs. Kennedy will make a new lease of premises No. 715 Market space, I have this to say.

87 I cannot enter into negotiations looking to a new lease of these premises until the termination of the present lease is admitted and the tax title, which your client has permitted to attach to the property, has been extinguished.

In pursuance of your other request that I have my client address a letter to your client saying whether she would accept rent, if tendered, I enclose herewith such a letter, signed by Mrs. Kennedy.

I am, very respectfully yours,

H. RANDALL WEBB.

(Ex. H. R. W. No. 4.)

OCTOBER 22ND, 1901.

Mrs. Caroline King.

DEAR MADAM: My counsel, Mr. Webb, informs me that your counsel, Mr. Tobriner, wishes me to write to you directly stating whether, in the event of your tendering rent to me for the premises, No. 715 Market space I will accept the same.

I have therefore to say to you, I would not accept the money, if offered, as I do not wish in any way to waive or qualify my notice terminating the tenancy of the premises.

By Mr. Tobriner's request, I send this to you through that gentleman.

I am very truly yours,

MARIANNE A. B. KENNEDY.

(Ex. H. R. W. No. 5.)

OCTOBER 30TH, 1901.

MY DEAR MR. DARLINGTON: Herewith I submit a proposition for compromise of the controversy between my client, Mrs. Kennedy, and your client, Mrs. King, growing out of the breach of the covenant to pay taxes upon the property described in the lease.

The proposition, as you will see, provides only for indemnity against the consequences of your client's wrongful act. If you succeed in defeating the tax title your client has no liability except for the costs; if you fail and Mrs. Kennedy loses her property your

client pays her the value. Since the whole difficulty is caused by your client's breach of the important covenants of the lease and her subsequent wilful refusal to redeem the property when the opportunity was presented to her, I consider this proposal most liberal.

Yours very truly, HENRY RANDALL WEBB.

(Ex. H. R. W. No. 6.)

Proposition for Compromise.

Mrs. Kennedy will waive the breaches of covenants in the case of premises No. 715 Market space, this city, and forego the forfeiture of the lease upon the fulfilment of the following conditions:

First. Mrs. Caroline King is to execute and deliver within — days a bond in the sum of seventy thousand dollars ($70000.)
88 payable to Mrs. Kennedy, her executors, administrators and assigns, executed by a surety company to be approved by Mrs. Kennedy or her counsel as surety therein, which shall be conditioned: That Mrs. King shall, by judicial proceedings in the courts of the District of Columbia and the Supreme Court of the United States, if necessary, have the deed from the District Commissioners to Meyer Cohen conveying sublot A in square numbered four hundred and thirty-two (432) and the tax sale upon which it is based, finally adjudged to be null and void. Said proceedings to be begun immediately, and prosecuted with all possible diligence, without cost or expense of any sort to Mrs. Kennedy or those claiming under her. In the event of said proceedings not finally resulting in a final decree declaring said deed and the tax sale upon which it is based to be null and void, the said sum of seventy thousand dollars ($70,000) the obligation of said bond, shall be forthwith payable, without abatement, as liquidated damages for the breach of the covenant of said lease by which the taxes on said property were not paid and the premises sold and the said conveyance by the Commissioners made. And further conditioned that in the event of any judicial proceedings being taken by the said Meyer Cohen, or any one claiming under him, to enforce the title under said deed to him or the tax sale upon which it is based against the complete and paramount title of Mrs. Kennedy, the said proceedings are to be defended by the said Caroline King, her executors and administrators, without cost or expense to Mrs. Kennedy or those claiming under her, and in the event of said proceedings resulting in the establishment of the title of said Cohen under said deed or the tax sale upon which it is based the said sum of seventy thousand dollars ($70,000) shall forthwith become payable without abatement as liquidated damages to the said Mrs. Kennedy, or those claiming under her.

Second. That, if the said proceedings to have said tax deed and tax sale declared null and void shall not be instituted in court

within — days from this date, then the lease in controversy shall be at once held to be forfeited without any demand or notice, and possession of said premises shall be surrendered on December 1, 1901, and in default of such surrender, Mrs. Kennedy or those claiming under her may at once proceed for possession before a justice of the peace under the landlord and tenant laws, without any notice of thirty days, which is hereby expressly waived.

Third. That on or before December 1, 1901, the said Caroline King, her executors or administrators, shall pay in full all taxes accruing due for the demised property from October 1, 1890, to date which have been paid by Mrs. Kennedy and which, under the terms of said lease were payable by the lessee. In default of such payment then all rights under said lease shall at once determine without demand or notice, and Mrs. Kennedy shall have the right to proceed at once for possession, as provided in the second provision hereof.

89 (Ex. H. R. W. No. 7.)

WASHINGTON, D. C., *Nov. 1st*, 1901.

DEAR MR. WEBB: Yours of the 30th ultimo, addressed to Mr. Darlington and enclosing a paper stating certain propositions for compromise, is duly received.

You will recall that, on the 12th ultimo, we wrote you on behalf of Mrs. Kennedy proposing to indemnify her against both costs and loss, if she would simply allow the use of her name in a proceeding to vacate the tax deed, and that, on the — ultimo, you answered peremptorily declining the proposal, and stating that Mrs. Kennedy could not entrust to Mrs. King the defence of her title. At that time, we had evidence of irregularities in the tax proceedings which, in our judgment, rendered defeat of the tax deed merely a matter of legal pr-cedure, to which proceeding, however, Mrs. Kennedy's name was essential.

While, of course, Mrs. King still has the same defence to the tax deed, certain other facts of which we then had some knowledge have come into clearer light, and, in our opinion, give Mrs. King an additional remedy in the premises.

We now know clearly, and are able to prove, the following facts:

1. That when Mr. Knight reported to Messrs. Kann the existence of the tax sale for the inadvertently omitted tax payment, and the Messrs. Kann communicated it to Mr. Cohen, neither Mr. Cohen nor the Kanns took any step, or proposed to do so, in the direction of taking advantage of the inadvertence in question.

2. That, upon Mr. Knight's making the same communication to Mrs. Kennedy, or to you-self for her, you called upon Mr. Cohen, and inquired whether his clients the Kanns, were still willing to accept a lease of the property at $300.00 per month, and that Mr. Cohen, on behalf of the Kanns, agreed to take such a lease, provided they were put into possession by you.

3. That, when it was proposed that Mr. Cohen should go to Rochester to purchase this tax certificate, both the Messrs. Kann and Mr. Cohen entertained and expressed grave doubts as to the propriety of such action, and finally took it only with the reservation upon their own part that, as they would hold this tax certificate, they would not be compelled to take any action which later they might not approve.

4. That, before going to Rochester, Mr. Cohen communicated to you, as the representative of Mrs. Kennedy, the fact that he was going, and for the purpose of purchasing the tax title against your client's property, and that you neither objected, nor took any steps, yourself, to see that an adverse claim to Mrs. Kennedy's title was not in this way procured; and that, up to the present time, Mrs. Kennedy has declined to allow Mrs. King the necessary use of her name to establish the invalidity of the tax deed, even upon terms of being satisfactorily secured against either cost or loss.

90 Under this condition of facts, we cannot agree to the proposition contained in your letter, that "the whole difficulty is caused by your (our) client's breach of the important covenants of the lease and her subsequent wilful refusal to redeem the property when the opportunity was presented to her." On the contrary, we submit that the whole difficulty has been caused by an attempt, the propriety of which at the time was gravely doubted by a majority of the parties invited to participate in it, to forfeit the lease by circuity, evidently through the impression that, if no interference was procured by Mrs. Kennedy, Mrs. King would complete the negotiations then in progress for redemption of the tax certificate, and with the further view that, should Mrs. Kennedy herself act without procuring the participation of persons apparently not in privity with her, equity would relieve against the forfeiture under the circumstances of the case. In other words, that Mrs. Kennedy, personally and through agencies invoked in her behalf, actively prevented the redemption of the tax certificate, and actually procured its withdrawal from the bank here in Washington where it had been deposited for the purpose of being redeemed.

These now undisputed facts create the inevitable alternatives following:

1. That the purchase was made by Mr. Cohen on behalf of the Messrs. Kann with an understanding or agreement between them and Mrs. Kennedy, acting either personally or through her representative, that the tax deed should not jeopardize the title to her property; or

2. That Mrs. Kennedy, or her representative, stood by acquiescing, by inaction if not affirmatively, in the purchase of the tax deed to her property, without protecting her in any way from the loss of her property through the said transaction—and that this was done well knowing at the time that the slightest intimation

to Mrs. King of the proposed purchase of the tax certificate would have led to instant protection against such a contingency.

The latter of these alternatives, it seems to us, is wholly inconceivable. If Mrs. Kennedy, herself, has deliberately and consciously placed herself in this condition, she is in no position to ask Mrs. King to indemnify her against the loss of her property; while, to be entirely frank with you, if any representative has done this, without her concurrence, such representative is the party to indemnify her against the risk of loss, if any such risk exists. You will pardon our speaking very plainly upon this subject, as we do so in the sincere desire to state the matter with absolute frankness, now, before litigation begins, in order that the full bearing of the case may be appreciated before it may be too late to avoid any unpleasant consequences which may arise. As above stated, we think it simply inconceivable that Mr. Cohen was either invited or knowingly permitted to purchase the tax title, without objection and without any effort to protect Mrs. Kennedy. If she is protected in that transaction,

as from your experience, ability and known fidelity as a
91 lawyer we feel absolutely sure must be the case, then she clearly stands in no just position to require Mrs. King to purchase her property at the price of $70,000.00, in the event that our judgment in respect to the tax sale should not ultimately be sustained by the courts.

Making, further, a frank disclosure to you of our present views of this case, we beg to say that, in our opinion, Mrs. King has, now, two defenses; namely, the defense of irregularity of the tax proceeding, and of her equitable right to be relieved against the forfeiture, under the circumstances, and, secondly, a defense in a court of equity against the methods above mentioned for depriving her of her lease, and of her right to apply to a court of equity for relief against the forfeiture.

We, therefore, do not now feel at liberty to enter into any compromise the effect of which would be to deprive Mrs. King of the right to resort to both of these grounds for relief. At the same time, in view of all the considerations affecting Mrs. Kennedy, as we understand them, we have advised Mrs. King, and she authorizes us to say, that she is willing to pay Mrs. Kennedy her rent, regularly and promptly as she has heretofore done, under a stipulation that neither of the parties is to be understood as thereby waiving any of the rights possessed by either, in the unfortunate controversy in which they have been involved.

Yours very truly,

J. J. DARLINGTON.
LEON TOBRINER.

W. C. S.

H. Randall Webb, Esq., city.

Ex. H. R. W. No. 8.

DISTRICT OF COLUMBIA, *ss:*

I, E. W. W. Griffin assistant assessor of the District of Columbia do hereby certify:

That the records of the tax office for the District of Columbia show that the taxes for the first half of the year ending June 30th, 1898, upon sublot A and the west two (2) feet front of lot three (3) by the depth of lot A in square four hundred and thirty-two in the city of Washington, District of Columbia, were due and payable in the month of November, 1897, but were not paid till December 31st, 1897. That the taxes on the same property for the first half of the year ending June 30th, 1900, were payable in November, 1899, and were not paid, and the second half of tax for the same year which fell due in May, 1900, also was not paid, but the tax for the whole of said year was paid on the 24th of July, 1900. That the taxes for the whole year ending June 30th, 1901, were all payable in the month of May, 1901, and were paid on the 24th of May, 1901.

The said records further show that all the other taxes on said sublot A and the west two (2) feet front of lot three (3) by the depth of lot A, the sixteen square feet of back ground of said lot
92 three (3), and the one hundred and seventeen (117) square feet of back ground of lot five (5) in said square four hundred and thirty-two (432), from those due for the second half of the year ending June 30th, 1898, to the year ending June 30th, 1901, were not paid when due and the property described was advertised for sale and sold for the non-payment of said taxes. That the only taxes which accrued due on any of said property between the first day of November, 1897, and the 31st day of May, 1901, which were paid without default were the taxes on said sublot A and the west two (2) feet front of lot three (3) by the depth of said sublot A for the year ending June 30th, 1901, which taxes were paid on the 24th of May, 1901.

Witness my hand and the seal of my said office this 16th day of April, 1902.

E. W. W. GRIFFIN,
Assistant Assessor, D. C.

Attest: L. L. NICHOLSON, JR.

[Seal of Assessors' Office.]

Affidavit of Henry Randall Webb.

Filed April 18, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

Henry Randall Webb, being duly sworn, deposes and says that he is one of the defendants in this cause, and executor under the will of Marianne A. B. Kennedy, deceased, and the sole devisee under said will of the real estate in these proceedings described. That for many years past he has been the counsel of said Marianne A. B. Kennedy, and was such counsel up to the time of her death. In the spring of 1901 this affiant had occasion to represent the said Marianne A. B. Kennedy in a matter connected with the premises No. 715 Market space, then occupied by the complainant in this cause, and one Harry King, a son of said complainant, acted as her agent and representative in said matter, and as such agent and representative called upon this affiant and sought to secure a new lease of said premises from this affiant's client to the complainant and the said Harry King and other sons of the complainant, conducting business in said premises as the firm of Caroline King and Sons. On said occasion the said Harry King produced the original of the lease, a copy of which is filed as Complainant's Exhibit "A" in this cause, together with a copy of the same, which was compared by affiant with said Harry King. That the negotiations so begun by said Harry King in behalf of said Caroline King were interrupted and were never resumed. At the time of said negotiations
93 this affiant had never been called upon by his client to advise her with respect to said lease and had no knowledge or information with reference to the performance by the lessee of the covenants of the lease, and had no occasion to enquire with respect to the same. Subsequently this affiant was advised that the defendants Kann were desirous of leasing said premises and were willing to pay a rental of twelve hundred dollars per year more for the property than complainant was paying, but no negotiations for a lease to the defendants Kann took place between this affiant or his client, said Marianne A. B. Kennedy, and the said defendants Kann, as the lease of the complainant precluded any such negotiations.

Late in the afternoon of the 25th of September, 1901, Charles H. Knight, a member of the bar, heretofore unknown to this affiant, called at affiant's office and informed affiant that the premises No. 715 Market space, being the property of said Mrs. Kennedy occupied by the complainant under the lease aforesaid, had been sold for taxes

in the spring of 1899; that said tax sale was irredeemable; and that the tax-sale certificate therefor was held and owned by one C. H. Wiltsie, of Rochester, New York. The said Knight represented that he had knowledge of a defect in said tax sale, and that he could have the same set aside, and offered to do so, if this affiant would employ him for that purpose upon a contingent compensation, which contingent compensation was to be one-half of the amount he should save affiant's client. The said Knight did not disclose to affiant in what the alleged defect in said tax sale consisted, and affiant entered into no agreement or arrangement with said Knight, but informed said Knight that he, affiant, would look into the matter, and, if he desired to retain the services of said Knight, would advise him thereof. That same afternoon affiant ascertained that Mrs. Kennedy had returned to the city and made an appointment to see her at 4.30 o'clock p. m. of the following day.

On the following day, the 26th of September, 1901, this affiant went to the tax office and made an examination of the tax records and found that the statements of said Knight as to the default in the payment of taxes, the sale of the property for taxes, the issuance of a tax-sale certificate to said Wiltsie, and that the said tax sale was irredeemable, were true. In the afternoon of the 26th of September affiant called upon Mrs. Kennedy and informed her of the fact that the complainant had made default in the payment of taxes in the spring of 1898, that the property had been sold for said default to C. H. Wiltsie, of Rochester, New York, and that the tax sale was irredeemable. Affiant then advised her that she had the right to declare the lease to the complainant forfeited by reason of the non-payment of taxes, and that, in the opinion of affiant, she should insist upon the forfeiture and terminate the lease with the complainant, but that she must decide for herself whether she would declare the lease forfeited and terminate the complainant's tenancy, or employ the said Knight upon his proposed contingent compensation to have the said tax sale set aside, and allow the complainant to remain in possession as her tenant.

94 On Friday, the 27th of September, affiant went to New York, but before leaving sent a note to Mrs. Kennedy, telling her that, if she intended to declare the complainant's lease forfeited, she must not accept any rent from complainant. On Monday morning, the 30th of September, affiant received a letter from Mrs. Kennedy, as follows:

"SUNDAY EVENING.

"DEAR MR. WEBB: I had just written you a note Saturday morning to send by my messenger, when yours announcing your contemplated absence was handed me.

"I had seen my friend & physician Dr. Fry the evening before, and tried to explain my new experience with Mrs. King, and he asked me if I could communicate with you early in the morning of Saturday and request you to telephone him at his office 1909 Q

street, at what time between the hours of 10 and 1 o'clock you could give him an interview at your office. His views in the matter seem to accord with yours—& I should be glad to have you two talk it over together, and then see me—& give me further advice.

"You say I must not receive the rent—which he will probably send me by mail on Tuesday morning—but I don't see how I can refuse it, unless I know where I am to get another tenant.

"Very truly, yours, M. A. B. KENNEDY."

Affiant then went to see the defendant Cohen and asked him if his clients, the Kanns, were still willing to lease the premises at three hundred dollars per month. Affiant then informed said Cohen that the complainant had forfeited her lease by making default in the payment of taxes, and that the property had been sold for said taxes. Later in the day said Cohen informed affiant that he had consulted his clients and that they were willing to lease the premises at the price stated, provided possession was given them and provided that their willingness was not used as a means of compelling the Kings to pay a higher rent. Affiant then informed said Cohen that he had advised his client of her right to forfeit the lease, and that in his opinion, she should do so, and that said tax sale was irredeemable. Affiant also informed said Cohen that C. H. Wiltsie of Rochester, New York, was the holder and owner of said tax certificate. Said Cohen then said to affiant, "Why don't you buy it from Wiltsie?" and affiant replied, "That is not necessary." Whereupon said Cohen replied, as affiant understood jestingly, "I believe I will buy it." To which this affiant replied, "Oh! no, don't do that, don't add that complication to the situation." And nothing more was said between affiant and said Cohen on the subject.

About 4.30 p. m. of said 30th of September affiant saw Mrs. Kennedy and informed her that the Kanns were still willing to rent the premises at the figure stated, and repeated his advice to her to return the check when it should be sent to her. In the meantime affiant had ascertained from the tax office that other taxes had been
95 permitted to fall in arrears, and that the principal part of the property had been sold a second time on April 13, 1900, for the taxes of 1899, but that the second sale had been redeemed by complainant in May, 1901. Affiant informed Mrs. Kennedy of these facts also. After seeing Mrs. Kennedy, at her suggestion, affiant went to see Dr. Fry, her physician and friend, and informed him of the facts. He approved the course of this affiant and the advice given to Mrs. Kennedy, and the course adopted by the latter in deciding to enforce the forfeiture of the lease with the complainant. Affiant, after leaving Dr. Fry, went to his own residence, arriving there about six o'clock p. m., and found the defendant Cohen standing on the steps of affiant's residence, awaiting an answer to his ring at the door bell. Said Cohen then informed affiant that he, Cohen, had decided to go on to Rochester and buy the said tax-sale certificate, and that he and affiant must now deal at arms' length, but

that he, said Cohen, thought that, in view of what had passed between them during the day, it was but fair that he, Cohen, should inform affiant of his, Cohen's purpose. To this declaration of said Cohen of his purpose to purchase the tax-sale certificate affiant replied, "I don't know about that," indicating his dissent from said Cohen's proposition, to which said Cohen replied, "Well, I do." To which affiant replied, "I am sorry to hear it, but I see no way of preventing you." And thereupon the said Cohen departed. Said Cohen did not disclose his purpose in seeking to acquire the said tax-sale certificate, nor did he make any other statement with regard thereto than as above quoted. It did not occur to affiant at the time that there was, nor does affiant now know of, any reason which made it of any consequence to his client who should be the owner of said tax-sale certificate, so long as it was not owned and controlled by affiant's client. Affiant considered that the said tax-sale certificate, if valid, would be equally valid in the hands of any holder; and that, if invalid, it could be set aside when owned by Cohen as readily as if owned by Wiltsie. Had it occurred to affiant that it would be more injurious to his client's interests for Cohen to own said tax-sale certificate than for Wiltsie to own it, affiant was powerless to prevent said Cohen's action. Affiant did not know Wiltsie's address in Rochester, nor did he know what amount Wiltsie would demand for the sale of said certificate; and at that hour it was impossible for affiant to have obtained the money necessary to go on to Rochester and attempt to compete with said Cohen for the purchase of said tax-sale certificate. Affiant did not then understand, nor does he now understand, that he owed any duty in the premises to the complainant; and he did not then know, nor did he discover until long after the tax deed conveying said property to said Cohen had been executed and recorded, that the complainant had had an option from Wiltsie to purchase said tax-sale certificate since the 25th of July, 1901, and had failed to do so. Affiant did not then know, and did not discover until long after the execution of said tax deed to said Cohen, that the said tax-sale certificate was then and had been since the 25th day of September in the Central national bank of this city subject
96 to the complainant's purchase, and that it remained there until after the close of banking hours on the first day of October, which affiant has since learned to be the fact. Affiant never at any time entered into any agreement, understanding or arrangement, express or tacit, or of any sort whatsoever, as to the purchase of said tax-sale certificate, or the use which was to be made of the same when purchased by said Cohen; and every averment, suggestion, intimation and insinuation in the bill of complaint to that effect is an unmitigated falsehood and is devoid of any foundation.

On the evening of October 1st, 1901, Mrs. Kennedy sent affiant a copy of her letter to the complainant, which is as follows:

"1630 R. I. AVE., *Oct. 1st*, 1901.

"To Mrs. H. King, Jr.:

"I have only learned within the last few days, that you have forfeited your lease of premises 715 Market space by neglecting to pay the taxes, and allowing the property to be *twice* sold, at tax sale.

"The lease being thus vitiated, and by advice of my attorney, I must decline receiving any further rental from you.

"For further explanation of my action in the matter, I refer you to Mr. H. Randall Webb.

"M. A. B. KENNEDY."

On the 2d of October, the said Harry King called to see affiant and affiant assured him that affiant's client was in earnest and intended to enforce the forfeiture of the lease. On October 3rd, Mr. Tobriner, the complainant's counsel, called on affiant to enquire if affiant's client really intended to insist upon the forfeiture, and also as to whether she had redeemed the tax sale. Affiant informed him that she did intend to terminate the lease, and that she had not redeemed the tax sale, but that affiant believed that Cohen had purchased the tax-sale certificate, as said Cohen had informed affiant that he was going to do so. Subsequently, and on the same day, affiant learned that Cohen had obtained a tax deed, and said Cohen informed affiant that Mr. Tobriner had inquired of said Cohen what he, Cohen, would take for said tax title, and that he, Cohen, had told Tobriner that he, Cohen, would consider any offer Tobriner would make. On October 4th, affiant served a formal notice to quit on the complainant. On October 5th, a Mr. Cahill called upon affiant, stating that he was complainant's real-estate agent, and asked affiant upon what terms affiant would give complainant a new lease. Supposing that Cohen would sell his tax title, affiant entertained Mr. Cahill's suggestion, and consulted his client, Mrs. Kennedy, and with her approval, was going to propose a new lease to the complainant conditioned upon the payment of higher rent and the extinction of Cohen's tax title by complainant. Before having an opportunity to submit this proposition to said Cahill, and on October 9th, Cohen called upon affiant in company with William G. Johnson, who informed affiant that he represented the Kanns, who were the real owners of the tax title, of which affiant had theretofore
97 had no knowledge, suggestion or intimation. Said Johnson then informed this affiant that the defendants Kann would not sell the said tax title nor release the same, and that, in his judgment, it was valid. He stated, however, that his clients would be disposed to give a quit-claim of the tax title to the client of affiant, Mrs. Kennedy, provided she would give to his clients a long lease of the property upon the terms which they had previously offered to lease the same, and that said tax title would not be released on any other terms. That, if affiant contested said tax title, he might succeed in such contest, but that, in the opinion of said Johnson, the tax title was valid and could not be defeated, and that, if it was es-

tablished, his clients would take the property without compensation to Mrs. Kennedy. Said Johnson also stated to affiant that under the statute the said tax deed was *prima facie* evidence of a good title, and that the burden would be upon affiant's client to show any defect therein, and that, as the terms of compromise proposed by him to affiant were in no respect harsh, and were more favorable to affiant's client than the subsisting lease, he considered that affiant should have no hesitation in recommending such a compromise to his client; but that, if affiant's client, notwithstanding such favorable offer of compromise, should insist upon litigating said tax title with the Kanns, he, said Johnson, could see no obligation, legal or moral, upon said Kanns which would restrain them from insisting upon their legal rights to the utmost, even to the extent of defeating the title of affiant's client to the whole property without compensation. Affiant informed said Johnson that he would consider the matter and confer with his client, Mrs. Kennedy; and affiant did confer with his said client and her physician and friend Dr. Fry, and recommended that said Johnson's proposition for a compromise of said tax title be accepted, to which affiant's client agreed, and said Dr. Fry then and there concurring in this affiant's advice, recommended to Mrs. Kennedy that said proposition be accepted. Subsequently this affiant informed said Johnson that his client was willing to compromise the tax title and obtain a release of the same on the terms proposed by said Johnson, and asked the said Johnson, if, in the event of his client being unable to evict the complainant for the forfeiture of the lease, the said Kanns would still insist upon their tax title, to which the said Johnson replied that he was not authorized to make any further concession, than as indicated, but that he wished it to be distinctly understood that, if affiant's client undertook to litigate the validity of said tax title, she must do so at her peril, and that, in the event of her failing in the litigation, she could expect no concession whatever from his clients, the Kanns.

Affiant further states that the foregoing is a full and complete statement of all that took place between affiant and the said Cohen and the said Johnson, or any one representing said Kanns, or any one whomsoever, with respect to said tax title. That this affiant did not understand, and does not now understand, that, in undertaking to relieve his client from the embarrassment of an adverse
98 tax title which complainant had permitted to be acquired, he was under no obligation to protect in any way the interests of the complainant. That he never understood, and does not now understand or believe, that the right of his client to forfeit the lease could be in anywise affected by the circumstance that the tax title had been redeemed, and that the affiant never did, nor attempted to do, nor agreed to do, anything to embarrass the complainant in applying for relief from the forfeiture which she had incurred by any dealings with said tax title or any agreement, arrangement or understanding, express or tacit, with any person whomsoever, and that every averment, suggestion, intimation or insinuation in the bill of

complaint to that effect is absolutely false and unfounded in fact. Affiant further states that since the institution of proceedings for the possession of said premises for his client, he has examined into the facts and has ascertained that said Harry King, Jr., never paid any of the taxes on said property during his lease, but that, on the contrary, the said taxes were all paid by his client, Mrs. Kennedy, who in a letter to this affiant on October 12, 1901, informed this affiant that she had been remiss in not remembering that the condition of paying the taxes was included in the original lease, and that she had paid them herself up to November, 1897, under the erroneous impression that she was obliged to pay them. Affiant further states that his client had no copy of said lease and that her forgetfulness of the fact that the tenant was obliged to pay the taxes was due in part to that circumstance, and in part to the extreme age of his client. Affiant further states that he has examined the records as to the payment of taxes on said sublot A, and that the records show that the tax for the first half of the year ending June 30th, 1898, payable on or before November 30th, 1897, was not paid until December 31st 1897; that the tax for the second half of said year ending June 30th, 1898, payable on or before the 31st of May, 1898, was not paid, and is the tax under which the tax title in these proceedings mentioned was acquired. That the tax on said property due and payable on or before November 30th, 1898, was not paid by the complainant, and the tax due on or before the 31st of May, 1899, was also not paid. That for said tax the said property was again sold in April, 1900, and purchased by said C. H. Wiltsie. That the taxes due in November, 1899, and in May, 1900, on said sublot A, were not paid until July 24th, 1900; while those due on the back ground were not paid at all, and the same was again sold in April, 1900. That the tax for the year ending June 30th, 1901, payable in the month of May, 1901, was paid on the 24th day of May, 1901, which was the only tax falling due during the entire term of said lease with respect to which the complainant or her predecessor in the lease did not make default, and on the 24th day of May, 1901, the said complainant redeemed the said sublot A from the tax sale made for the non-payment of the taxes due in November, 1898, and May, 1899. Affiant further states that the said premises leased to the complainant consist of the said sublot A and a strip two feet front of lot three by the depth of lot A and part of lots three (3) and five (5), constituting
99 the rear ground of said premises, but as to these parts of said premises the complainant and her predecessor in title under the lease have made default in the payment of said taxes during the entire term of said lease, with the exception of the tax due May, 1901, on the said strip two feet front by the depth of lot A, which was paid by the complainant on May 24th, 1901. Affiant further states that the taxes paid by his testatrix and which under the lease were payable by the complainant or her predecessor under the lease amounted in the aggregate to about twenty-five hundred dollars.

Affiant further states that the tenancy under said lease com-

menced on the first day of October, 1890, and was terminated by the notice of this affiant's testatrix on the fourth day of October, 1901, a period of eleven years; and that during said period of eleven years the taxes on said property were due and payable twenty consecutive times; but that during said period of eleven years, the complainant and her predecessor in title under the lease paid taxes on but three occasions, to wit, on December 31st, 1897; July 24th, 1900; and May 24th, 1901.

This affiant further states that the assignment of lease in these proceedings described made by Harry King, as administrator of Henry King, Junior, to the complainant Caroline King was attacked as fraudulent in an equity proceeding of the Ohio National Bank *et al. vs.* Caroline King *et al.*, being number 19,338 of the equity dockets of this court. That in an amended bill filed in said cause on the 24th day of June, 1901, it is averred among other things, as follows:

"That complainants are informed and believe and upon information and belief aver that on the 25th of August, 1897, the said leasehold interests of the said Henry King, Jr., deceased, mentioned in the petition aforesaid, were then, and still are, of great value; that among said leasehold interests was the lease of premises known as 715 Market space, which was then, and now is, worth at least $10,000, and could have been sold at that time for that amount, all of which was well known to the said Harry King and Caroline King."

That in answer to said amended bill, sworn to by said Harry King, the administrator of Henry King, Jr., and filed in said cause on the 13th day of August, 1901, the said Harry King, administrator, in answer to said amended bill, stated among other things, as follows:

"That the lease mentioned in said petition and referred to in said amended bill was at that time bearing a very large and expensive rental; and various amounts due thereunder for rent were overdue and unpaid, and the said lease was liable to forfeiture."

Affiant further states that at the time of making said answer said Harry King and said Caroline King were partners carrying on business in the premises No. 715 Market space, and had been as far back as February, 1898; that the said Harry King had had the management of said leasehold premises in his control, and was at the time of making said answer, and for some time theretofore, in correspondence with said C. H. Wiltsie with reference to said tax-sale certificate.

100

This affiant further states that the averments in the bill of complaint to the effect that his client, Mrs. Kennedy, was unwilling to enforce the forfeiture of said lease and was willing to waive the same in favor of the complainant, and that she was compelled to enforce said forfeiture by the threats and menaces of the defendants Kann or their counsel, is, so far as the knowledge of this affiant goes, absolutely false. That no one of the defendants, save this affiant, nor

counsel of any of them, ever communicated with, or attempted to communicate with, affiant's client, Mrs. Kennedy, and the only communications on the subject which she ever received, from any person other than this affiant and her physician Doctor Fry, so far as this affiant knows, were communications from the counsel of complainant. That this affiant was informed by counsel for complainant before this bill was filed that his client was willing to waive the forfeiture and receive rent from the complainant; that this affiant immediately consulted his client with respect to such representation, and his said client denied ever having indicated any such willingness on her part, or having authorized any one else to do so, and the said Dr. Fry likewise denied to this affiant having made any such representation as to Mrs. Kennedy's position, or having been authorized by Mrs. Kennedy to make any such representation. This affiant further says that his client and her physician were both extremely anxious to avoid litigation with either the complainant or the defendants Kann, and urged this affiant to endeavor to effect a settlement of the matter which would obviate litigation, which this affiant earnestly endeavored to do. Affiant had been definitely informed by counsel for the defendants Kann that they would not surrender said tax title, and affiant could not compel such surrender without litigation; but, in order to relieve his client as far as possible from the necessity for litigation, affiant proposed to the counsel for the complainant that complainant should begin proceedings against said Cohen to have said tax title set aside, at the complainant's expense, but that, as such litigation, if unsuccessful, would result in a total loss of Mrs. Kennedy's property, he insisted that complainant should give a satisfactory indemnity bond in amount sufficient to cover an adverse result of such litigation. Counsel for the complainant declined to give such indemnity to this affiant's client, and affiant then informed his client that there was nothing which he could do to avert litigation with one party or the other, and affiant advised his client, that, in his judgment, it was safer to proceed to enforce the forfeiture of the lease, as the consequences of litigation to enforce said forfeiture would be far less serious to her than would be litigation over the tax title, for the amicable settlement of which an advantageous proposition had been made. This affiant thereupon prepared a complaint for the necessary landlord and tenant proceeding against the complainant, and left the same with his client to sign in case she determined to continue the course adopted by her to enforce the
101 forfeiture of the lease. This affiant made no threats to his said client, nor in any way attempted to coerce her judgment or decision, and every insinuation and suggestion of the bill of complaint to that effect is a falsehood. This affiant was not present when said complaint was signed by his said client, but the same was signed in the presence and with the approval of her friend and physician Dr. Fry, who brought said complaint to this affiant already signed by Mrs. Kennedy, and left it with affiant for the purpose of

arranging to have a notary go to Mrs. Kennedy's house and take her oath to the same; and this affiant was informed by said Doctor Fry that before Mrs. Kennedy signed said complaint he, Doctor Fry, had conferred with the complainant's counsel to see if the complainant would undertake to defeat the tax title and give to Mrs. Kennedy a satisfactory bond of indemnity against the consequences of such litigation.

On the 17th of October this affiant received from the counsel of the complainant, Mr. Tobriner, a letter a copy of which is herewith filed, marked "H. R. W. No. 1," and on October 22 another letter from Mr. Tobriner, marked "H. R. W. No. 2." This affiant replied to said letters, a copy of which is herewith filed, marked "Exhibit H. R. W. No. 3," in which this affiant enclosed the letter from his client insisted upon by Mr. Tobriner, a copy of which is herewith filed marked "Exhibit H. R. W. No. 4." Affiant's client being extremely anxious to avoid litigation and becoming much worried and annoyed by the anxiety of the matter, exhibited extreme distress, and became most earnest and importunate that this affiant should seek to discover some means of settling the matter without litigation with any of the parties, either the complainant or the owners of the tax title, and notwithstanding her previous direction to this affiant to decline the offer of complainant's counsel, urged this affiant to endeavor to get the complainant to carry out the proposition made in the said letters of her said counsel. Thereupon, to relieve as far as possible the distress and anxiety of his client, this affiant addressed a letter to the counsel of the complainant on the 30th of October, a copy of which is herewith filed marked "Exhibit H. R. W. No. 5," enclosing a proposition for compromise in substance as affiant believes not differing from that tendered by the counsel for complainant, but merely more precise as to its details. A copy of said proposition is herewith filed, marked "Exhibit H. R. W. No. 6." This proposition of affiant was rejected by the counsel for the complainant in a letter under date of November 1st, 1901, a copy of which is herewith filed, marked "Exhibit H. R. W. No. 7." This affiant also files herewith the certificate of E. W. W. Griffin, assistant assessor of the District of Columbia, marked "Exhibit H. R. W. No. 8," showing that the complainant made default in the payment of all taxes accruing due and payable from the time of the assignment of the lease to her to the month of May, 1901, with the single exception of the taxes on part of the property accruing due and payable in that month.

Affiant further states that as appears by Complainant's Ex-
102 hibit D with the bill counsel for complainant informed this affiant's client that the said tax sale was void, and as appears from Complainant's Exhibit G this affiant wrote to the counsel of the complainant among other things:

"My client, is, of course, most anxious to defeat if possible the tax title, and I will gladly accept aid for that purpose from any source, and if your clients have any information which would aid her I

consider that they are under moral and legal obligations to impart it to me without delay."

Neither the complainant nor her counsel at any time gave to this affiant any information whatsoever bearing upon the validity or invalidity of said tax sale, or gave or offered to this affiant the slightest assistance to enable affiant to extinguish said tax title, but withheld all information if any they had in their possession relating to the invalidity of said tax sale from this affiant, and the first knowledge that this affiant had of the grounds upon which the complainant and her counsel claimed that the said tax sale was invalid was after the bill in this cause was filed setting out the alleged grounds of invalidity.

HENRY RANDALL WEBB.

Subscribed and sworn to before me this 16 day of April, 1902.

OSCAR LUCKETT,
Notary Public, D. C.

[NOTARY'S SEAL.]

Affidavit of Henry D. Fry.

Filed April 18, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING, Complainant,
vs.
MARIANNE A. B. KENNEDY ET AL. } In Equity. No. 22834.

Henry D. Fry, being first duly sworn, deposes and says that he is a physician, and was the physician and intimate friend of Mrs. Marianne A. B. Kennedy for a number of years prior and up to the time of her death, and was acquainted with her property interests and business affairs.

On the evening of the 27th of September affiant was informed by Mrs. Kennedy that she had had a visit from her counsel, Mr. Webb, who had informed her that he had learned that Mrs. King had failed to pay the taxes on premises known as 715 Market space, this city, which Mrs. King held as assignee of a lease between Mrs. Kennedy and Henry King, Jr., then deceased, and that the property had been sold for said taxes, and a tax certificate issued to one Wiltsie, in Rochester, New York. That Mr. Webb had advised her that under the terms of said lease the lease was forfeited by the non-payment of the taxes and that she, Mrs. Kennedy, had the right to enforce
103 that forfeiture and terminate the lease, and that she must do one of two things, either enforce the forfeiture or take steps to have the tax sale cancelled, if that could be accomplished, as Mr. Webb had been informed it could be by the person who first informed him of the fact about the tax sale. She also informed this

affiant that Mr. Webb had advised her to insist upon the forfeiture of the lease and affiant approved Mr. Webb's advice in speaking to Mrs. Kennedy, and requested Mrs. Kennedy to write to Mr. Webb to make an appointment to see this affiant at his office on Saturday morning, the 28th, but owing to Mr. Webb's absence in New York on that day the appointment could not be made.

After five o'clock on the afternoon of the 30th of September, Mr. Webb called to see affiant and informed him particularly about the fact of the tax sale and that the Kanns were willing to lease the property and pay $1,200 a year more rent than King was paying, and Mr. Webb explained to affiant that Mrs. Kennedy had the right to enforce the forfeiture of the lease and that he had advised her to do so. Affiant approved Mr. Webb's course and opinion in the matter and expressed gratification that Mrs. Kennedy had the right to terminate the lease. Mrs. Kennedy at the time was about eighty years of age and in feeble health and began to worry over the matter, and late in the month of October wrote affiant, appealing to this affiant about the distress the matter was causing her.

Affiant having learned from Mr. Webb the fact that a tax title had been obtained by Mr. Cohen in the interest of the Kanns, and that Mr. William G. Johnson was one of the counsel for the said Kanns, on the morning of the 24th of October, this affiant called to see Mr. Johnson, and not finding him at his office, left word that affiant would endeavor to return later in the day and if he should not do so that said Johnson should communicate with affiant. After leaving said Johnson's office, affiant met Mr. Joseph J. Darlington, who was affiant's personal counsel, and who was then also the counsel of Mrs. Caroline King, and talked with said Darlington about the matter. Mr. Darlington advised affiant that the tax title could be easily gotten rid of, and that his client, Mrs. King, was willing to undertake the necessary proceedings at her own cost to extinguish the tax title and would indemnify Mrs. Kennedy against all loss.

As a result of affiant's conference with Mr. Darlington, affiant reached the conclusion that the Kanns and Cohen were in the wrong in the matter and had acted improperly in acquiring the tax title, and believing that the proposition of Mr. Darlington would terminate the matter without litigation with Mrs. Kennedy, affiant favored that course, and so advised Mr. Johnson, the attorney for the Kanns, by telephone on the 25th of October and again in person on the 29th.

Affiant continued in this attitude of mind until about November 7th, when affiant, having been invited by Mr. Webb to go with him to see Mr. R. Ross Perry, learned from that gentleman that he, Mr. Perry, approved Mr. Webb's course and opinion in respect to what should be Mrs. Kennedy's action, and Mr. Webb having shown
104 affiant a letter from Mr. Darlington which seemed to decline to carry out the proposition previously made in behalf of Mrs. King to extinguish the tax title and indemnify Mrs. Kennedy,

affiant called to see Mr. Darlington and learned from Mr. Darlington that Mr. Darlington's client, Mrs. King, would not comply with Mr. Webb's proposition for the extinction of the tax title and giving a proper indemnity bond to Mrs. Kennedy to protect her against the unsuccessful issue of the proceeding to cancel the tax deed.

Thereupon affiant considered that there was no other course open to Mrs. Kennedy for her protection than the prosecution of the proceedings to terminate the lease and evict the tenant. This affiant was present when Mrs. Kennedy signed the complaint in the landlord and tenant proceedings against Mrs. King. Mr. Webb was not present. She signed the paper voluntarily and without coercion, threats or menaces from any person whomsoever. In taking that step she was acting exclusively upon the advice of her counsel, Mr. Webb, and with the approval of this affiant.

After signing the complaint for the landlord and tenant proceedings, Mrs. Kennedy handed the same to this affiant, with the request that he would give it to Mr. Webb, which affiant did, requesting Mr. Webb, by Mrs. Kennedy's direction, to have a notary come up and take her affidavit to the complaint.

This affiant never assumed to represent Mrs. Kennedy as her agent or to interfere with or control Mr. Webb's advice or his conduct of Mrs. Kennedy's affairs as counsel. This affiant never had any communication whatever with the complainant, Mrs. King, and never informed her, or any one for her, that Mrs. Kennedy did not consider it proper to insist upon the forfeiture of the lease or that she was willing to waive the forfeiture and permit Mrs. King to continue under the lease. This affiant was never authorized by Mrs. Kennedy to make any such representation to any person.

Affiant further states that so far as he knows neither of the Kanns nor the said Cohen nor the counsel of either of them, nor any one in their behalf, ever communicated with Mrs. Kennedy with reference to this matter, or attempted to influence her in any way, and affiant's intimacy with her and knowledge of her affairs at the time was such and his interviews of such frequency that had such occurred he would most undoubtedly have been informed of it by Mrs. Kennedy.

HENRY D. FRY.

Subscribed and sworn to before me this sixteenth day of April A. D. 1902.

[SEAL.]

ANTHONY L. RAY,
Notary Public, D. C.

105 *Order Assigning Cause to Justice Clabaugh, &c.*

Filed April 18, 1902.

In the Supreme Court of the District of Columbia, in General Term.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. In Equity.

Mr. Justice Hagner and Mr. Justice Bradley considering themselves disqualified to sit in this cause by reason of kinship to some of the parties, it is by the court ordered that this cause be and the same is hereby referred to Mr. Justice Clabaugh for his disposition of the same.

E. F. BINGHAM, *C. J.*

Order: Injunction Pendente Lite.

Filed June 28, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

This cause coming on to be heard upon the question of the granting of an injunction *pendente lite*, as prayed in the bill, and having been argued by the solicitors of the parties respectively, and duly considered, it is thereupon by the court, this 28th day of June, A. D. 1902, ordered that the said injunction *pendente lite* be, and the same hereby is, granted as prayed in the bill, provided the complainant, within twenty days from the date hereof file her bond in this cause to the defendants H. Randall Webb, executor and devisee and Maria G. Dewey in the penal sum of forty thousand dollars, with one or more sureties approved by the court or one of the justices thereof, conditioned to indemnify the said defendants Webb and Dewey and each of them, against any and all loss or damage or injury to them or either of them, arising or to arise from the tax sale to said property in controversy, described in the bill, held by the defendant Myer Cohen as in said bill alleged, and in default of the filing of such bond, approved as aforesaid within the time above limited therefor, it is further ordered that the restraining order heretofore granted in this cause shall, at the expiration of the said twenty days, stand discharged.

HARRY M. CLABAUGH, *Justice.*

106 *Notice of Offer of Surety on Injunction Bond and to Approve Bond.*

Filed June 30, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

Take notice, that on Thursday the third day of July, A. D. 1902, at ten o'clock, or as soon thereafter as counsel can be heard, we shall ask the court, Bingham, chief justice, to approve the bond in injunction, required under the order passed herein the twenty-eight- day of June, A. D. 1902, and to offer as surety thereon the Citizens' Trust and Guaranty Company of West Virginia, having offices in the Bond building, corner of New York avenue and Fourteenth street, northwest, Washington, D. C.

J. J. DARLINGTON,
LEON TOBRINER,
Solicitors for Complainant.

To Messrs. H. Randall Webb, Andrew Y. Bradley, William G. Johnson, solicitors for defendants.

Injunction Bond.

Filed July 3, 1902.

Know all men by these presents, that we, Caroline King, as principal, and the Citizens' Guaranty and Trust Company of West Virginia, as surety, are held and firmly bound unto H. Randall Webb, executor and devisee under the will of Marianne A. B. Kennedy, and Maria G. Dewey, and each of them and each of their heirs, executors, administrators and assigns, in the sum of forty thousand ($40,000.00) dollars, lawful money of the United States, for the payment of which we bind ourselves and each of us, and our and each of our heirs, executors, administrators and successors, respectively, jointly and severally by these presents:—

Witness our hands and seals this first day of July, A. D. 1902, at the city of Washington, in the District of Columbia.

Whereas by an order passed by the supreme court of the District of Columbia, the twenty-eighth (28) day of June, A. D. 1902, in a certain cause numbered 22834, equity, wherein the said Caroline King is complainant and said H. Randall Webb as executor and devisee, and the said Maria G. Dewey and others are defendants, it

was ordered that an injunction *pendente lite*, as prayed for in the bill therein filed, be granted, provided said complainant within twenty days from the said date file her bond therein to the said defendants
Webb and Dewey, in the penalty of forty thousand ($40,000.00)
107 dollars, conditioned to indemnify said defendants and each
of them against any and all loss or damage or injury to them, or either of them, arising or to arise from the tax sale to said property in controversy, described in the said bill:—

Now the condition of the above obligation is such, that if the said Caroline King shall indemnify the said H. Randall Webb, executor and devisee, and the said Maria G. Dewey, and each of them, their and each of their heirs, executors, administrators and assigns, against any and all loss or damage or injury to them or either of them, arising or to arise from the tax sale of lot "A" in square numbered four hundred and thirty-two (432) in the city of Washington in the District of Columbia, held by Myer Cohen, described in the bill in said cause, then this obligation shall be void; the same otherwise to remain in full force and effect.

CAROLINE KING, [SEAL.]
CITIZENS' TRUST & GUARANTY CO. OF W. VA.,
By GEO. F. POWELL, [SEAL.]
Attorney-in-Fact.

Signed sealed and delivered in the presence of—
PHILIP KING,
As to Caroline King.

Approved:
E. F. BINGHAM,
Chief Justice.

Appeal.

Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } Equity. No. 22834.

The clerk will please enter an appeal to the Court of Appeals by the defendant Henry Randall Webb, executor and devisee, under the will of Marianne A. B. Kennedy, deceased, from the order passed herein on the 28th day of June, 1902.

E. S. THEALL,
For Defendant.

Appeal entered as ordered, July 9, 1902.

108 In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. In Equity.

The President of the United States to Caroline King, Meyer Cohen, Sigmund Kann and Louis Kann, and Maria G. Dewey, Greeting:

You are hereby cited and admonished to be and appear at a Court of Appeals of the District of Columbia, upon the docketing the cause therein, under and as directed by the rules of said court, pursuant to an appeal filed in the supreme court of the District of Columbia, on the 9th day of July, 1902, wherein Henry Randall Webb, executor and devisee of Marianne A. B. Kennedy, deceased, is appellant, and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court of the District of Columbia.

Witness the Honorable Edward F. Bingham, chief justice of the supreme court of the District of Columbia, this 9th day of July in the year of our Lord one thousand nine hundred and two.

JOHN R. YOUNG, *Clerk.*

Service of the above citation accepted this 10th day of July, 1902.

W. G. JOHNSON,
Sol. for Sigmund Kann, Louis Kann, & Meyer Cohen.
ANDREW Y. BRADLEY,
Sol. for Maria G. Dewey.

[Endorsed:] No. 22834. Equity. Caroline King *vs.* Marianne A. B. Kennedy *et al.* Citation. Issued July 9th, 1902. Served copy of the within citation on within-named Caroline King July 11, 1902. Aulick Palmer, marshal. E. S. Theall, attorney for appellant.

Memorandum.

July 15, 1902.—Appeal bond filed.

Directions to Clerk for Preparation of Record.

Filed July 24, 1902.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

The clerk of the supreme court of the District of Columbia will please prepare a transcript of the record for appeal, in the above-entitled cause, including the following papers, filed on the
109 dates hereinafter mentioned, copies of a number of which are herewith submitted.

1901, Dec. 4. Bill with Exhibits A, B, B², C, D, E, F, G, H.
" " 4. Restraining order, awarded M. 62, p. 438.
1902, Mar. 7. Bill of revivor
" Apr. 4. Supplemental bill & exhibits
" " 4. Injunction order, awarded M. 65, p. 103.
" " 14. Motion for payment of rents into court
" " 15. Answer of Maria Gillis Dewey
" " 18. Answer of Myer Cohen and two exhibits
" " 18. Answer of Sigmund Kann and Louis Kann, and exhibit and affidavit of Louis Kann.
" " 18. Answer of H. Randall Webb and affidavit and exhibits.
" " 18. Affidavit of Henry D. Fry.
" " 18. Order referring cause to Justice Clabaugh
" June 28. Injunction order *pendente lite*, awarded M. 65, p. 298.
1902, June 30. Injunction bond, notice of offer of surety.
" July 3. Injunction bond & approval
" " 9. Appeal by executor and devisee from order of June 28, 1902.
Citation on appeal & appeal bond.

Very respectfully,
E. S. THEALL,
Solicitor for Appellant, H. R. Webb.

110 *Motion to Limit Time to Take Testimony.*

Filed November 14, 1902.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

And now comes the complainant and moves the court to limit the time for the taking of testimony herein.

J. J. DARLINGTON,
LEON TOBRINER,
Solicitors for Complainant.

Take notice: That on Monday the seventeenth (17) day of November, A. D. 1902, at ten o'clock a. m., or as soon thereafter as counsel can be heard, we shall call the foregoing motion to the attention of equity court No. one, Justice A. B. Hagner.

J. J. DARLINGTON,
LEON TOBRINER,
Solicitors for Complainant.

To Messrs. William G. Johnson, Perry & Perry, Andrew Y. Bradley and E. S. Theall, solicitors for defendants.

111 *Order Limiting Time to Take Testimony.*

Filed February 3, 1903.

In the Supreme Court of the District of Columbia.

CAROLINE KING, Plaintiff,
vs.
MARIANNE A. B. KENNEDY ET AL., Defendants. } No. 22834. Equity.

This cause, coming on to be heard upon the motion of the complainant to limit the time for the taking of testimony therein, it is by the court this 3rd. day of February, A. D. 1903 ordered that the complainant have thirty days from the date of this order within which to take testimony on her behalf, that the defendants have thirty days from the completion of the complainant's testimony within which to take testimony on their behalf, and that the complainant have fifteen days from the conclusion of the testimony on

behalf of the defendants within which to take her testimony in rebuttal.

By the court,

HARRY M. CLABAUGH, *Justice.*

We consent:

——— ———,
For Plaintiff.
R. ROSS PERRY & SON,
For Def't Webb.
A. Y. BRADLEY,
For Def't Dewey.
W. G. JOHNSON,
For Def'ts Kanns & Cohen.

112 *Mandate.*

Filed February 16, 1903.

UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the honorable the justices of the supreme court of the District of Columbia, Greeting:

Whereas, lately in the supreme court of the District of Columbia, before you or some of you, in a cause between Caroline King, complainant and Marianne A. B. Kennedy, Myer Cohen, Sigmund Kann, *et al.*, defendants, equity, No. 22,834, wherein the order of the said supreme court entered in said cause on the 28th. day of June, A. D. 1902, is in the following words, viz:

"This cause coming on to be heard upon the question of the granting of an injunction *pendente lite*, as prayed in the bill, and having been argued by the solicitors of the parties respectively, and duly considered, it is thereupon by the court, this 28th day of June, A. D. 1902, ordered that the said injunction *pendente lite* be, and the same hereby is, granted as prayed in the bill, provided the complainant, within twenty days from the date hereof file her bond in this cause to the defendants H. Randall Webb, executor and devisee and Maria G. Dewey in the penal sum of forty thousand dollars, with one or more sureties approved by the court or one of the justices thereof, conditioned to indemnify the said defendants Webb and Dewey and each of them, against any and all loss or damage
113 or injury to them or either of them, arising or to arise from the tax sale to said property in controversy, described in the bill held by the defendant Myer Cohen as in said bill alleged, and in default of the filing of such bond, approved as aforesaid within the time above limited therefor, it is further ordered that the restrain-

ing order heretofore granted in this cause shall, at the expiration of the said twenty days stand discharged.

HARRY M. CLABAUGH, *Justice.*"

as by the inspection of the transcript of the record of the said supreme court, which was brought into the Court of Appeals of the District of Columbia by virtue of an appeal, taken by Henry Randall Webb, executor and devisee of Marianne A. B. Kennedy deceased, whereon, Caroline King, Myer Cohen, Sigmund Kann and Louis Kann, and Maria G. Dewey were made the parties appellees, by a citation issued and served agreeably to the act of Congress in such case made and provided, fully and at large appears.

And whereas, in the present term of January, in the year of our Lord one thousand nine hundred and three, the said cause came on to be heard before the said Court of Appeals on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered—adjudged and decreed by this court that the order of the said supreme court in
114 this cause be, and the same is hereby, affirmed with costs; and that the said Caroline King *et al.*, recover against the said Henry Randall Webb, executor and devisee of Marianne A. B. Kennedy, deceased, for their costs herein expended and have execution therefor.

And it is further ordered, that this cause be, and the same is hereby, remanded to the said supreme court for further proceedings therein according to law.

JANUARY 20, 1903.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Richard H. Alvey, Chief Justice of said Court of Appeals, the 16" day of February in the year of our Lord, one thousand nine hundred and three.

Costs of Caroline King et al.

Clerk	$ P
Attorney	a
Printing record	i
	d

ROBERT WILLETT,
Clerk of the Court of Appeals of the District of Columbia.

Memorandum.

March 5, 1903.—Cause certified to Justice Gould.

115 *Motion for Order Requiring Complainant to Pay Certain Moneys, &c.*

Filed Nov. 4, 1903.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

Now comes the defendant, Maria G. Dewey, by Andrew Y. Bradley, her solicitor, and moves the court for an order herein to pay forthwith to receivers, to be appointed by the court, for the use and occupation of the building and premises No. 715 Market space, the sum of five thousand dollars ($5,000.00), and the further sum of two hundred dollars ($200.00) on the last day of each and every month hereafter, during the pendency of this cause, or until the further order of the court.

ANDREW Y. BRADLEY,
Solicitor for Defendant Dewey.

116 *Order Appointing Receivers.*

Filed Nov. 4, 1903.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

This cause coming on to be heard upon the motion of the defendant, Maria G. Dewey, and it appearing to the satisfaction of the court that Caroline King, the complainant herein, is now, and has been, using and occupying the building and premises No. 715 Market space since the 30th day of September, A. D. 1901, and that said complainant has paid nothing for such use and occupation since said last mentioned date, it is this 4th day of November, A. D. 1903,

Adjudged and ordered that H. Prescott Gatley and Andrew Y. Bradley be, and they hereby are, appointed receivers in this cause, to serve without compensation upon giving bond in the penalty of ten thousand dollars ($10000) the cost of the annual premium upon

said bond to be charged by said receivers against the funds which may, under the terms of this order, come into their possession. And it is hereby further

Adjudged and ordered that the said Caroline King pay forthwith to said receivers the sum of five thousand dollars ($5,000.00), and the further sum of two hundred dollars ($200.00) on the last day of each and every month hereafter until the further order of this court, said payments to be made without prejudice to the rights
117 and interests of any of the parties to this cause; and it is hereby further

Ordered that said receivers hold, and, from time to time, invest, under the direction of this court, the moneys received and collected by them under and by virtue of this order.

By the court

ASHLEY M. GOULD,
Associate Justice.

Memorandum.

November 4, 1903.—Receivers' bond filed.

Petition for Authority to Make Loan.

Filed Jan. 20, 1904.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

The petition of Andrew Y. Bradley and H. Prescott Gatley, receivers, respectfully represents:

1. That they were appointed receivers herein heretofore on the 4th day of November, A. D. 1903, and thereafter duly qualified as such by giving bond in the sum of $10,000.

118 2. That as such receivers they have collected from Caroline King, the complainant herein, the sum of five thousand four hundred dollars ($5,400.), and have deposited the same in the International Banking Corporation, in this city.

3. That your receivers have received an application from Finella M. Alexander, widow, for the loan of $5,000.00 upon lots numbered 8 and 9, in square numbered 671, in the city of Washington, in said District; that both of said lots are improved by brick dwellings, known as numbers 65 and 67 New York Ave., northeast; that the aggregate assessed value of the ground upon which said dwellings are located is the sum of $1239.00, and the assessed value of said dwellings is the sum of $2800.00; that your receivers are informed

by the agent of said Alexander that each of said lots and premises rents for the sum of twenty-five dollars per month; that the title to said lots has been examined by the Real Estate Title Insurance Co., and by said company certified to be good in the said Finella M. Alexander.

4. That your receivers have examined said lots and premises and are of opinion that the same are of sufficient value to justify the loaning thereon of the said sum of five thousand dollars; that your receivers have also caused the said property to be examined and appraised by two real estate brokers of this city, whose affidavits are annexed hereto and prayed to be read as a part hereof.

5. That your receivers have had presented to them another application for a similar loan upon certain lots located on Tennessee avenue, between 14th and 15th streets, northeast; that your receivers examined said property and caused the same to be examined by certain real estate brokers; that said brokers recommended that your
119 receivers refuse to make the loan as applied for upon said lots located on Tennessee avenue; that your receivers have necessarily incurred certain expenses in causing said several pieces of property to be examined by said real estate brokers.

Wherefore the premises considered your receivers pray:

1. That an order be passed herein authorizing and directing your receivers to loan to Finella M. Alexander the sum of five thousand dollars for the period of three years, at the rate of five per centum per annum; said loan to be evidenced by the promissory note of said Alexander and secured by a first deed of trust upon lots 8 and 9, in square 671.

2. That your receivers be further authorized and directed to pay to the following named real estate brokers the various amounts respectively designated, for services rendered by them in examining and appraising the several pieces of property hereinbefore referred to: To Messrs. Murray A. Cobb and Hilliard Owen, for the examination and appraisement of lots 8 and 9, in square 671, each the sum of $2.50; to Messrs. H. Bradley Davidson and Hilliard Owen, for the examination and appraisement of certain lots on Tennessee Ave., between 14th and 15th streets, northeast, each the sum of $5.00; to Hugh Rowland, Esq., the sum of one dollar ($1.00) notary's fees.

ANDREW Y. BRADLEY,
H. PRESCOTT GATLEY,
Receivers.

DISTRICT OF COLUMBIA, ss:

We do solemnly swear that we have read the foregoing petition by us subscribed and know the contents thereof; that
120 the matters and things stated therein on our own knowledge are true, and those stated upon information and belief, we believe to be true.

ANDREW Y. BRADLEY.
H. PRESCOTT GATLEY.

Subscribed and sworn to before me this 20th day December, A. D. 1904.

J. R. YOUNG, *Clerk*,
By FRED. C. O'CONNELL, *Ass't. Clerk*.

Filed Jan. 20, 1904.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

I, Murray A. Cobb, do solemnly swear that I am a real estate agent, conducting my business in the city of Washington, District of Columbia; that at the request of Messrs. Bradley and Gatley, receivers in the above entitled cause, I examined the premises numbered 65 and 67 New York avenue, northeast; that said premises are located upon lots 8 and 9, in square 671; that each of said houses is of the height of two stories with the basement, and contains nine rooms; that, in my opinion, each of said lots with the houses thereon are worth the sum of three thousand five hundred dollars, and would bring that amount if sold at public auction; and that, in my opinion, a loan of $2,500 for the period of three years, at five
121 per cent., upon each of said houses, would be a good and safe investment.

MURRAY A. COBB.

Subscribed and sworn to before me this 20th day of January, A. D. 1904.

[NOTARIAL SEAL.] HUGH B. ROWLAND,
Notary Public, D. C.

Filed Jan. 20, 1904.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

I, Hilliard Owen, do solemnly swear that I am a real estate agent conducting my business in the city of Washington, District of Columbia; that at the request of Messrs. Bradley and Gatley, receivers in the above entitled cause, I examined the premises numbered 65

and 67 New York avenue, northeast; that said premises are located upon lots 8 and 9, in square 671; that each of said houses is of the height of two stories with the basement, and contains nine rooms; that, in my opinion, each of said lots with the houses thereon are worth the sum of three thousand five hundred dollars, and would bring that amount if sold at public auction; and that, in my opinion, a loan of $2,500 for the period of three years, at five per
cent., upon each of said houses, would be a good and safe
122 investment.

HILLIARD OWEN.

Subscribed and sworn to before me this 20th day of January, A. D. 1904.

[NOTARIAL SEAL.] HUGH B. ROWLAND,
Notary Public, D. C.

Order Authorizing Loan.

Filed Jan. 20, 1904.

In the Supreme Court of the District of Columbia, Holding a Special Term in Equity.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

This cause coming on to be heard upon the petition of Andrew Y. Bradley and H. Prescott Gatley, receivers, and the affidavits in support thereof, and the same being duly submitted to and considered by the court it is this 20th day of January, A. D. 1904

Adjudged and ordered that said receivers be and they hereby are authorized and directed to loan the sum of five thousand dollars ($5,000.00) for the term of three years upon lots numbered 8 and 9, and the improvements thereon, in square numbered 671, said loan to be evidenced by the promissory note of Finella M. Alexander for the amount of said loan, with interest thereon at the rate of 5 per centum per annum, said note to be secured by a first deed of trust upon said property; and it is hereby

Further ordered that said receivers be, and they are hereby authorized and directed to pay to the following named per-
123 sons the various sums respectively designated, viz:—to Murray A. Cobb the sum of $2.50; to Hilliard Owen the sum of $7.50; to H Bradley Davidson the sum of $5.00; and to Hugh Rowland, Esq., the sum of one dollar ($1.00).

By the court,

ASHLEY M. GOULD, *Justice.*

124 Supreme Court, District of Columbia.

Order Book.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } In Eq. 22834.

The clerk will please calendar this cause for hearing at the next term of the court.

W. G. JOHNSON,
Counsel for Def'ts Kann.

Calendared by clerk Feb'y 12, 1904.

125 *Testimony on Behalf of Complainant.*

Filed June 8, 1904.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } In Equity. No. 22834.

WASHINGTON, D. C., *February 20th*, 1903—
3 o'clock p. m.

Met pursuant to the foregoing notice.

Present on behalf of the complainant, J. J. Darlington, Esq., and Leon Tobriner, Esq.

Present on behalf of the defendants, Messrs. Cohen & Kann, W. G. Johnson, Esq.

Present on behalf of the defendant, *W.* Randall Webb, R. Ross Perry, Esq.

Whereupon DAVID WARNER, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. DARLINGTON:

Q. Please state your occupation? A. I am a clerk in the office of the collector of taxes of the District of Columbia.

Q. How long have you been so occupied? A. Thirty-one years.

Q. Please state whether at our request you have examined the books and assessments of taxes of the District of Columbia
126 with a view of ascertaining what has been the amount of taxes due on sub-lot A and part of lot 3 in square numbered

433, from the year 1890 down to the years 1896–97 inclusive? A. I have, sir.

Q. Take up first sub-lot A. Will you please state what was the amount of taxes on sub-lot A for the year 1890–91. A. On part of lot 3 and sub-lot A, assessed in the name of Mary A. Gillis, the tax was $280.71

Q. Was that tax paid? A. It was. My statement only covers the second half of that year. The second half of the tax amounted to $140.35 and was paid May 29th, 1891 by check of Swormstedt & Bradley.

Mr. DARLINGTON: In connection with that statement we desire to offer in evidence check drawn by H. King, Jr., dated May 26th, 1891 to the order of M. A. B. Kennedy for $140., endorsed by M. A. B. Kennedy and Swormstedt & Bradley.

It is agreed that the endorsement of M. A. B. Kennedy on this check is genuine. The signatures of the maker, H. King, Jr., and of Swormstedt & Bradley, endorsers, are to be proved hereafter.

The above mentioned check is offered in evidence by counsel for the complainant, subject to such further proof, and the same is filed herewith and marked Exhibit D. W. No. 1.

Q. Will you please tell us what were the taxes on part of lot 3 and sub-lot A in square 432 assessed in the name of
127 Mary T. Gillis for the year 1891–92. A. $280.71.

Q. Was that tax paid, and if so how was it paid? A. The first half was paid November 30th, 1891 by check of Swormstedt & Bradley for $140.36. The second half was paid May 31st, 1892 by check of Swormstedt & Bradley for $140.35.

Mr. DARLINGTON: We offer in evidence two checks, the first dated November 14th, 1891, purporting to be signed H. King, Jr. to the order of M. A. B. Kennedy for $140 and endorsed M. A. B. Kennedy, and the second purporting to be signed H. King, Jr. per Harry King, attorney, to the order of M. A. B. Kennedy for $140, both purporting to be endorsed by M. A. B. Kennedy.

It is agreed that the endorsement of M. A. B .Kennedy upon these checks is genuine.

The above mentioned checks are filed herewith and marked Exhibits D. W. No. 2 and D. W. No. 3.

Q. What was the tax on the property mentioned, assessed in the name of Mary T. Gillis, for the years 1892–93? A. $280.71.

Q. How was that tax paid and when? A. The first half of the tax amounting to $140.36 was paid November 16th, 1892 by check of Swormstedt & Bradley; and the second half amounting to $140.35 was paid May 31st, 1893, by check of Swormstedt & Bradley.

Mr. DARLINGTON: We offer in evidence the check of H. King, Jr. to the order of M. A. B. Kennedy, dated May 20th, 1893,
128 for $140, stating on its face "for taxes," and purporting to be endorsed by M. A. B. Kennedy, the endorsement being vouched for by H. King, Jr.

It is agreed by and between counsel that the endorsement of M. A. B. Kennedy is genuine.

The above mentioned check is offered in evidence subject to further proof of the signature of H. King, Jr., and the same is filed herewith and marked Exhibit D. W. No. 4.

Mr. DARLINGTON: I will state that we have been unable to find the check for the payment of the tax for the other half of the years 1892–93.

By Mr. DARLINGTON:

Q. Confining your answer to the same property, assessed in the name of Mary T. Gillis, please state what was the amount of the tax for the years 1893–94. A. It was $295.88.

Q. How was it paid and when? A. The first half, amounting to
4*
$147.91 was paid November 29th, 1893. Our day-book does not show who made that payment. The second half amounting to $147.94 was paid May 31st, 1894 by check of Swormstedt & Bradley.

Mr. DARLINGTON: In this instance also we find only the second check dated May 31st, 1894, drawn by H. King, Jr. to the order of M. A. B. Kennedy for the sum of $147.94, and endorsed by M. A. B. Kennedy.

It is agreed by and between counsel that the endorsement of M. A. B. Kennedy is genuine.

The above mentioned check is offered in evidence by counsel for the complainant and the same is filed herewith, marked Exhibit D. W. No. 5.

129 Q. What is the record of taxes for this property for the years 1894–95? A. $295.88.

Q. How was that amount paid and when? A. It was paid May 31st, 1895 by check of Swormstedt & Bradley for $295.88.

Q. That was paid in a single installment? A. Yes, sir.

Q. Do you remember whether, in that year, all taxes were made payable at one time? A. Yes, sir.

Mr. DARLINGTON: We offer in evidence a check drawn by H. King, Jr. to the order of M. A. B. Kennedy, dated May 31st, 1895, for $295.88, endorsed by M. A. B. Kennedy.

The endorsement of M. A. B. Kennedy is conceded by counsel to be genuine.

The above mentioned check is offered in evidence by counsel for the complainant and the same is filed herewith and marked Exhibit D. W. No. 6.

Q. Please tell us what the record shows with reference to the payment of taxes on this property for the years 1895–96. A. The amount of the tax was $295.88. The first half, amounting to $147.94,

[* In pencil in copy.]

was paid November 30th, 1895 by check of Swormstedt & Bradley. The second half amounting to $147.94, was paid May 29th, 1896, by check of R. E. Bradley, agent.

Mr. DARLINGTON: In that connection we offer two checks
130 of H. King, Jr. one dated November 22nd, 1895, to the order of Mrs. M. A. B. Kennedy for the sum of $140, stating on its face "taxes" and endorsed M. A. B. Kennedy; and the other dated May 28th, 1896 to the order of Mrs. A. B. Kennedy, for $147, endorsed M. A. B. Kennedy and endorsed "For deposit only credit account of R. E. Bradley, agent."

It is agreed by and between counsel that the endorsement of M. A. B. Kennedy on the endorsement of said checks is genuine.

The above mentioned checks are offered in evidence by counsel for the complainants and the same are filed herewith marked Exhibits D. W. No. 7 and D. W. No. 8.

By Mr. DARLINGTON:

Q. What is the record for the following year, 1896–97? A. The tax for the year 1896–97 was $275.91. The first half, amounting to $137.96 was paid November 30th, 1896 by check of R. E. Bradley, agent. The second half amounting to $137.95 was paid May 29th, 1897 by check of R. E. Bradley, agent.

Mr. DARLINGTON: We offer in evidence, in this connection, a check of H. King, Jr. dated November 30th, 1896 to the order of R. E. Bradley for $143.42, bearing upon its face "Taxes first half '97" and endorsed by the stamp of R. E. Bradley, agent; and the check of H. King, Jr. dated May 29th, 1897 to the order of M. A. B. Kennedy for $143.42, with a memorandum on its face "Taxes 715 Market space," purporting to be endorsed by M. A. B. Kennedy.

The signature of M. A. B. Kennedy upon said check is conceded by said counsel to be genuine.

131 The above mentioned checks are offered in evidence by counsel for the complainant and are filed herewith and the same are marked Exhibit D. W. No. 9 and D. W. No. 10.

Q. Do your records show the assessment and payment of taxes on the rear part or background known as part of 3 and of 5 for these same years? A. Yes, sir; but that is under another name. That is assessed in the name of J. C. and M. A. B. Kennedy.

Q. Will you please tell us what your record shows in regard to the payment upon this property? A. For the year 1890–91 the taxes were $6.75. The second half amounting $3.37 was paid May 29th, 1891 by check of Swormstedt & Bradley.

For the years 1891–92 the tax amounted to $6.75. The first half, amounting to $3.38, was paid November 30th, 1891 by check of Swormstedt & Bradley. The second half amounting to $3.37 was paid May 31st, 1892 by check of Swormstedt & Bradley.

In the years 1892–93 the taxes amounted to $6.75. The first half amounting to $3.38 was paid November 16th, 1892 and the first half duplicate on part of 5 amounting to $2.66 was paid November 16th, 1892 by check of Swormstedt & Bradley. The second half amounting to $3.37 was paid May 31st, 1893 by check of Swormstedt & Bradley.

For the year 1893–94, the taxes amounted to $6.33. The first half, amounting to $3.17 was paid November 29th, 1893. The day books fail to show who made that payment. The second half amounting to $3.16 was paid May 31st, 1894, by check of Swormstedt & Bradley.

132 For the year 1894–95 the tax amounted to $6.33. It was paid May 31st, 1895 by check of Swormstedt & Bradley.

For the year 1895–96 the tax amounted to $6.33, with a penalty of 19 cents, making a total of $6.52. It was paid May 29th, 1896 by check of R. E. Bradley.

For the year 1896–97, the tax amounted to $6.33. The first half, amounting to $3.17 was paid May 30th, 1896 by check of R. E. Bradley. The second half amounting to $3.16 was paid May 29th, 1897 by check of R. E. Bradley.

Q. Please look at the book which I now hand you and state whether you are able to identify it as the pamphlet of advertised tax sales of property in the District of Columbia in the year 1898, giving notice that tax sales will be made on the 12th day of April, 1899, and continuing until the property described in it shall have been sold. A. Yes, sir; I identify this pamphlet as a list of tax sales commencing on the 12th day of April 1899 for taxes due for the year ending July 1st, 1898.

Mr. DARLINGTON: We offer in evidence so much of this pamphlet as refers to sub-lot A and part of lot 3, background and part of lot 5, background, in square 413; the same showing the advertisement of part of lot 3, being the west two feet front; and of sub-lot A for the second half of the year 1898 and assessed in the name of Mary T. Gillis; and part of lot 3 being the 16 square feet back ground for the year 1898, assessed in the name of John C. and M. A. B. Kennedy; and part of lot 5, being the 117 square feet background for all of the year 1898 assessed in the name of John C. and M. A. B. Kennedy.

32

133 It is agreed by and between counsel that the examiner may copy into the record from page 165 of the tax sale advertisement in question, the advertisement offered in evidence.

The above mentioned advertisement is in the words and figures following, to wit:

Square No. 432.

Gillis, Maria T.:

Part of lot 3, being the west 2 feet front—

Second half of tax for the year 1898	9.45
Penalty	1.04
Advertisement	1.20
	11.69

Sublot A and improvements—

Second half of tax for the year 1898	128.50
Penalty	14.13
Advertisement	1.20
	143.83

Kennedy, John C., and M. A. B. Kennedy:

Part of lot 3, being the 16 square feet background—

All of tax for the year 1898	1.68
Penalty	.24
Advertisement	1.20
	3.12

Part of lot 5, being the 117 square feet background—

All of tax for the year 1898	4.65
Penalty	.65
Advertisement	1.20
	6.50

134 Cross-examination waived.

DAVID WARNER.

Subscribed and sworn to before me this 13th day of May, A. D. 1904.

JOHN W. HULSE,
Examiner in Chancery.

HARRY KING, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. DARLINGTON:

Q. What relationship do you bear to the late H. King, Jr.? A. I am his son.

Q. Did you ever see him write? A. Yes, sir.

Q. Are you familiar with his handwriting? A. I am.

Q. Please look at the exhibits marked D. W. Nos. 1 to 10 inclusive, being the checks which have been put in evidence in connection with

the testimony of the preceding witness, and state, if you can, in whose handwriting are the words "H. King, Jr." where they appear on each of these checks? A. All of the checks are in my father's handwriting, with the exception of the one dated May 16th,
135 1892, marked Exhibit D. W. No. 3, which is my handwriting. It is signed H. King, Jr. per Harry King, attorney.

Q. Did you sign that check by his authority? A. Yes, sir; the power of attorney was filed with the bank at the time.

It is agreed by and between counsel that these checks have been duly paid by the bank.

Cross-examination waived.

HARRY KING.

Subscribed and sworn to before me this 6th day of June, A. D. 1904.

JOHN W. HULSE,
Examiner in Chancery.

The further taking of these depositions was thereupon adjourned until Monday, February 23, 1903 at 12:30 o'clock p. m.

136 WASHINGTON, D. C., *February* 28, 1903—1 o'clock p. m.

Met pursuant to notice at the office of Leon Tobriner, Esq., Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendants Messrs. Cohen and Kann, Mr. Johnson.

Present on behalf of the defendant W. Randall Webb, Mr. Perry.

Present on behalf of the defendant Dewey, Mr. Bradley.

It is hereby stipulated by and between counsel that Exhibits A, B, B^2, C, D, E, F, G, and H, to the complainant's bill, shall be considered as proved and in evidence, objection being waived to the fact that they are copies, and the originals not being called for.

137 Complainant also offers in evidence the letter of Mrs. M. A. B. Kennedy to Mr. Webb, written on the 29th day of September, 1901.

Said letter is in the words and figures following, to wit:

"SUNDAY EVENING.

DEAR MR. WEBB: I had just written you a note Saturday morning to send by my messenger, when yours announcing your contemplated absence was handed me.

I had seen my friend & physician Dr. Fry the evening before, and tried to explain my new experience with Mrs. King, and he asked me if I could communicate with you early in the morring of

Saturday and request you to telephone him at his office 1909 Q street, at what time between the hours of 10 and 1 o'clock you could give him an interview at your office. His views in the matter seem to accord with yours—& I would be glad to have you two talk it over together, and then see me—& give me further advice.

You say I must not receive the rent—which he will probably send me by mail on Tuesday morning—but I don't see how I can refuse it, unless I know where I am to get another tenant.

Very truly, yours, M. A. B. KENNEDY."

138 It is hereby stipulated and agreed by and between counsel that Mrs. Gillis was buried on the ninth day of January, 1871, at Glenwood cemetery, in this city; that she died intestate, and that her only heir at law was Marianne A. B. Kennedy.

JAMES G. RODGERS, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined,

By Mr. TOBRINER:

Q. Mr. Rodgers, what is your name? A. James G. Rodgers.

Q. Your age? A. Sixty-one.

Q. Where do you reside? A. 1352 Yale street.

Q. Mr. Rodgers, were you ever employed as bookkeeper for Mrs. Caroline King? A. Yes, sir.

Q. From what time? A. From the 15th of April, 1900, for over two years.

Q. Did you have anything to do with the payment of taxes upon premises No. 715 Market space, while you were so employed? A. I did.

Q. Will you state the circumstances of your paying such taxes, if any you did pay? A. On the 24th of July, 1900, I went over
139 to the tax office and asked for the tax bills for what we called the branch property.

Q. Right in that connection, what was this store known to you as? A. The branch of King's palace—King's Palace branch.

Q. You went to the collector of taxes? A. For a bill of the taxes that were due; and it being the first bill that I had paid on taxes, I was a little anxious to know that I got a bill for everything that was due. I asked them if that was everything that was due, and they told me yes. I took the bill to the store, and Mr. King signed the check for it in the name of the firm, and I took it over and paid it, and got a receipt.

Q. Will you look at this tax bill and that check (handing witness papers) and see if that is the tax bill which you received at that time? A. Yes, sir.

Q. And whether that is the check with which you paid it? A. Yes, sir; that is the check; and that is the receipt made in the

name of Maria T. Gillis. I always had to ask for Maria T. Gillis, as the property remained in that name.

Q. You say this is the bill that was presented to you? A. Yes, sir.

Q. And which you paid? A. Yes, sir.

Q. You asked for the tax bill on premises No. 715 Market
140 space, as I understand you? A. Yes, sir; but I also called it under the proper lot number, &c., which I gave from the books.

Mr. TOBRINER: We offer this check in evidence, and also the tax bill.

Said papers are filed herewith, marked Exhibits Rodgers Nos 1 and 2.

Mr. PERRY: We have no objections to those.

By Mr. TOBRINER:

Q. Mr. Rodgers, how did you happen to go to the tax office to obtain this bill; by whose instructions? A. I couldn't swear positively now that it was Mr. Harry King's instruction, but I am certain it was, because I never went there for a tax bill on the branch property without his instruction. I wouldn't go there of my own accord, without I received instructions to go for that bill.

Q. Did you go there after that? A. Yes, sir.

Q. For the purpose of paying taxes upon this branch store?

Mr. PERRY: I will have to object to the preceding form of the last preceding question and this one. Just ask him what he went there for.

By Mr. TOBRINER:

Q. Did you go there thereafter? A. Yes, sir.

Q. For what purpose? A. The same purpose, paying
141 taxes.

Q. When? A. I went there on the 21st of May, 1901, to get the bill for the taxes of 1901, and the bill was handed to me. On the 24th of May, Mr. Harry King signed a check for that bill, and I took it over, and as three days had passed between the time I got the bill and the check he made out, I went and asked them, and said: "Now look here; am I sure this is all right?" They said: "Yes, sir, this is all right." I said: "This clears the taxes on this property." "Well," he says, "there seems to be some back taxes on it." I said: "That is very funny. I paid the taxes here a year ago, and they said the taxes were all paid, and I know there has nothing accrued since." He says: "We can't tell you what it is. You will have to go downstairs to find out." I went downstairs and showed them this check and this bill. I said: "It is very funny. I have been trying to keep these taxes up. You told me here a year ago there was nothing due on this property, and upstairs here, after I brought this check for 1901, they tell me there

is something back of it. What is it?" I said: "Give me a bill for whatever is due on the property, and I will get another check." I didn't pay him that check on the first bill. I held it still. He handed me over then another bill, which covered the last half of 1898 on a little sub-lot there, and the whole of 1899 on that same sublot, and the whole of 1889 on lot A, amounting to nearly double the 1901 taxes. "Well," I said, "this is very funny. Mr. King wants to keep these taxes paid up, and here you told me here a year ago, and again the other day, that there was nothing due; and
142 here I find out a whole year has not been paid." "Well," he says, "I don't know how that occurred." I went back to the office and showed this bill to Mr. King, and I said, "You had better give me another check." So he gave me another check, and I took the two checks over together and got the receipts for those bills.

Q. Look at this check, No. 7923, on the Lincoln national bank and state whether that is the check, and whether that is the tax bill in payment of which the check was delivered by you at the tax office? A. Yes, sir; for the whole of the year 1901.

Mr. TOBRINER: We offer the check and the tax bill in evidence.

Said papers are filed herewith, marked Exhibits Rodgers Nos. 3 and 4.

Mr. JOHNSON: Before you offer these in evidence, I would like to ask the witness a question about some writing on this tax bill.

By Mr. JOHNSON:

Q. I notice, Mr. Rodgers, in red ink written on this bill, the words "branch store." A. I wrote that.

Q. That is your writing? A. Yes, sir.

Q. That is your memorandum to show what it related to? A. For filing away; yes, sir.

Q. I also notice on it in front of the figures "Square 432" in red leadpencil a letter "a." A. Yes, sir; I notice that now.

143 Q. Did you put that on? A. No, sir.

Q. That was on when you got it from the tax office? A. I suppose so. I didn't know anything about it. I have seen it on there lately, in looking at it.

By Mr. TOBRINER:

Q. Now I ask you to look at a check, No. 7925, on the Lincoln national bank, dated May 24, 1901, for $385.39, and state whether that is the check you have also referred to as having been paid by you on that day to the tax collector? A. Yes, sir.

Q. Look at the bills with it, and state whether those are the bills which were paid by that check? A. Yes, sir; they are. Those are my red ink memorandums on them, what they are for. Those memorandums were made at the time I got the receipts for filing away, so that when we open the receipt we could tell what it was for.

Mr. TOBRINER: We offer those papers in evidence.

Said papers are filed herewith marked Exhibits Rodgers Nos. 5, 6, 7, and 8.

Cross-examination.

By Mr. PERRY:

Q. Mr. Rodgers, where are you employed now? A. I am not employed sir.

Q. How long have you been unemployed? A. About a week.

Q. Where was your last employment? A. I was employed by a member of Congress.

144 Q. I think you said you went to Mrs. King's as bookkeeper, when? A. On April 15th, 1901.

Q. Is that your profession or business, bookkeeper? A. Yes, sir.

Q. For whom did you keep books prior to going with Mrs. King? A. Samuel Friedlander & Company. I went from Friedlander's to Mrs. King.

Q. How long had you been with Friedlander? A. A little over a year.

Q. Are you from Washington, Mr. Rodgers? A. No, sir; I don't belong here. I belong in New York.

Q. When did you come from New York to Washington? A. About seven years ago.

Q. Whom did you go to work for when you came here? A. I came here to go in to the Government service.

Q. Where were you in the Government service? A. I was not in the Government service.

Q. Did you remain here? A. Yes, sir; I passed the examination, but I didn't get the appointment.

Q. Were you working for anyone afterwards, when you did not get the appointment? A. Yes, sir; I did some accountant work occasionally.

Q. What was the first employment you got, and when? A. The first employment I did in Washington was with Tolman's

145 laundry.

Q. What year was that? A. I couldn't tell you that.

Q. How long did you remain with Tolman's laundry? A. There was a defalcation in the office. I was only at it, just as an accountant, for a week, overhauling his books, to find out where he——

Q. There was a defalcation in the office, you say. A. Yes, sir.

Q. Whom did you go to work for next after Tolman's laundry? A. Friedlander's—no; I beg your pardon. I went to House & Hermann's.

Q. How long did you work for them? A. Three months and a half.

Q. And from there you went where? A. To Friedlander's.

Q. And you worked with them until you went to King's? A. Yes, sir.

Q. You left the Kings when? A. About June, last year.

Q. June of 1902? A. About June or July of last year.

Q. Since then, I understand, you have been working for a member of Congress? A. Yes, sir.

Q. Who is the member of Congress, Mr. Rodgers? A. Well, I would rather not state.

146 Q. Have you any objection to stating whom you are working for? A. I don't like to give those things out.

Q. Sir? A. Yes; I don't see what purpose it serves. I wouldn't like to, without his permission, anyway.

Q. Were you keeping books in New York before you came here? A. Yes, sir; part of the time.

Q. Whom did you work for in New York before you came here? A. The Erie Railroad Company.

Q. How long for them? A. I guess I was with them four years, as chief clerk in the office of the purchasing agent of the Erie railroad.

Q. What was the name of the purchasing agent at that time? A. Schaefer.

Q. Do you recollect his first name? A. E. B. Schaefer.

Q. Is he still there; do you know? A. No, sir; he is not.

Q. Do you know where he is? A. He is somewhere down South, with the same gentleman that got him into the Erie, who was the first vice-president.

Q. Now, Mr. Rodgers, I understand that, going to Mrs. King's on the 15th of April, 1900, you took up the business of bookkeeping there? A. Yes, sir.

147 Q. Did you have any other thing to do than to keep books? A. No, sir.

Q. On the 24th of July, 1900, you went to the tax office? A. Yes, sir.

Q. At whose instructions? A. As I said just now, I couldn't positively swear that Mr. Harry King told me to go, but I am sure he must have told me, for I wouldn't have gone without his instruction.

Q. That was the first time you had ever gone there? A. Yes, sir.

Q. Did you take anything there with you? A. No, sir.

Q. You simply went to ask for a tax bill? A. Yes, sir.

Q. Did you take the number of the lot and square with you? A. Yes, sir.

Q. In what shape was it? A. On a little slip of paper, just to facilitate their hunting up.

Q. Where did you get the lot and square, on that piece of paper, from? A. From the books—from their ledger.

Q. It was on the ledger? A. Yes, sir.

Q. I suppose that ledger is there now? A. Yes, sir.

148 Q. Was it a ledger account, kept with a certain square and lot? A. No, sir.

Q. In what shape was it on that ledger? A. It was simply kept on the expense account of the branch store.

Mr. PERRY: I would like that ledger produced, gentlemen. I would like to have that ledger, and I may want to ask the witness some further questions when it is produced. I will not stop now about that.

By Mr. PERRY:

Q. Then you transcribed on a little piece of paper the lot and square, did you? A. Yes, sir.

Q. I suppose you do not recollect that from memory now? A. It is lot A. The square number I forget.

Q. Then you went up to the tax building? A. Yes, sir.

Q. Where was that? A. Around the corner here, above.

Q. Where did you go? A. I went into the tax collector's office.

Q. Do you know the tax collector there personally? A. No, sir.

Q. That was the first time you had ever been in that building, was it not? A. Yes, sir.

Q. Was it on the right hand or the left as you got in? A.
149 The left.

Q. Who did you see? A. I saw the clerk at the pigeon-hole, marked K to L, or K to P, or some other letter. It was K, anyway. They have the holes divided into letters, and I went to the one with the letter K on it.

Q. Did you ask for the tax bill for Mr. Harry King? A. Yes, sir.

Q. Did you say anything else? A. I told them it was the first time I had ever paid any taxes, and I should see in future that they were attended to promptly. This was a little late, in July. I said "In future, we will see that they are attended to promptly."

Q. I suppose you went to the letter K because you were going to ask for Mr. Harry King's tax bill? A. Yes.

Q. You did ask for Mr. Harry King's tax bill, did you? A. No, I asked for the bill for this lot here. Now that you ask me that question it distinctly comes to my memory that I did ask for Mr. King, and he couldn't find anything about it, so he had to go and look up the lot and the number, and he found it was in the name of Maria T. Gillis.

Q. You recollect that distinctly now, do you? A. Yes, sir; I remember that distinctly.

Q. Do you recollect what clerk it was? A. No. I have
150 been waited on there by three men clerks and one woman clerk. I couldn't tell which one it was that gave me this.

Q. And having looked it up, he gave you, as I understand, this bill? A. Yes, sir.

Q. I do not know whether you were asked in whose handwriting that "Caroline King's Sons" is, or not. Did Mr. Johnson ask you

that? A. Let me see it a minute. (After examination) That is in the same handwriting, the clerk's. That is put on there to show who made the check to pay this bill. That is put on there by the cashier. When you make this payment, the cashier writes there to show who paid this check, or I should say who drew the check in payment of that bill. That is written by the cashier when you make the payment.

Q. Did you know anything about the taxes for the year 1899? A. No, sir.

Q. This expresses on its face as being for the taxes for the year ending June 30, 1900. A. Yes, sir.

Q. Did you ask anything about the taxes for the year 1899? A. I did not. I simply asked them if that was all that was due on that property. I suppose that the taxes of 1899 had been paid.

Mr. PERRY: I object to the witness's supposition, and move to strike it out.

Mr. DARLINGTON: We agree to strike it out.

151 By Mr. PERRY:

Q. As I understand you, you did not ask anything about the taxes prior to 1900, except in the general way you have said? A. That is all. I asked them to give me a bill for everything that was due on that property.

Q. Why did you ask them to give you a bill for everything that was due on the property. A. Because it was my first payment of taxes, and I wanted to know that I started square.

Q. Had anybody said anything to you about there being any back taxes on it? A. No sir.

Q. It was not intimated to you in any way that there was anything back on it? A. No, sir.

Q. You asked for all the taxes due on that property? A. Yes, sir.

Q. Had Mr. King told you to pay anything more than the tax bill for the current year? A. I can't remember that. I went over for the taxes. He always told me to get everything that was due. That was his general instructions to me, whenever I went over.

Q. This was the first occasion that you had to go over there, as I understand it? A. Yes, sir.

Q. I want you to try and recollect the instructions you got from Mr. King. Did he tell you to go over and get the taxes for
152 the current year or not? A. That I couldn't swear to. He told me to get a bill for the taxes due on the branch, and I asked for all the taxes that were due on the branch; and it being my first payment, I wanted to start straight. I asked for them all more particularly on my own account.

Q. Was there any suggestion made to you by any body that there were any back taxes due on that property? A. No, sir.

Q. When you got back, did you make any memorandum of what

you had asked for? A. The memorandum that you see right across the face of that bill there—"Branch store."

Q. Yes; branch store. A. That is all, and the entry of course which goes from the check book into the expense account of the branch—all taxes.

Q. What I want to know is whether you made any memorandum of what you had asked the clerk for. A. No, sir.

Q. When was your attention next directed to the subject? A. The 21st of May, 1901.

Q. That is almost a year afterwards? A. Yes, sir.

Q. Ten months afterwards? A. Yes, sir.

Q. Was there anything to fix in your memory the inquiry you had made of the tax clerk in July 1900? A. No, sir; noth-
153 ing, except it was as I say the first payment, and I was anxious to be sure that I started straight on the thing.

Q. When you got back, did you show this bill to anybody? A. I don't know that I did, sir. It was not my habit to do so. I generally filed that away. Mr. King was satisfied with my word. If he would pay, he would sign the check, and he would ask me probably if I had the receipt all right, and I would file it away, and that was the last of it.

Q. In whose handwriting is that check? A. Mine.

Q. The body of that check? A. Mine.

Q. Who wrote there "All of 1900"? A. I did.

Q. Who wrote "Taxes on 715 Market space for M. A. B. Kennedy"? A. Mr. Harry King.

Q. When did he write that? A. I don't know, sir.

Q. Why did you put there "All of 1900"? A. It was my habit always to put a memorandum on the check to show what it was for, to correspond with this bill.

Q. Why did you not put "All taxes to date"? A. Because this bill only calls for taxes of 1900.

Q. But the important thing for you to know, as I understand, was that there were no back taxes; that you were starting right?
154 A. Yes, sir.

Q. Why did you not put "All taxes to date," instead of "All of 1900," on there? A. For the simple reason that when this receipt is taken out and shows the taxes for 1900, the check has got to correspond, and this will show that it is the check for 1900.

Q. But as I understand the prominent point impressed on your mind, going there on your first visit, as to be sure you were starting right. A. Yes, sir.

Q. And that all of the taxes had been paid except those for 1900. A. Yes, sir.

Q. Now, you got that bill for 1900? A. Yes, sir.

Q. And you drew this check? A. Yes, sir.

Q. And instead of putting on there "All back taxes paid," you put "All of 1900"? A. Yes, sir. Of course I had nothing to do with back taxes on that bill. That check corresponds with the bill

Q. You went there again in May 1901, I understand? A. Yes, sir.

Q. Whom did you go to then? A. The same clerk I had been to before, or the same desk—the same pigeon-hole.

Q. What inquiry did you make of him? A. I told him I
155 wanted the tax bill for this branch store.

Q. Did you say anything about the tax bill for 1901? A. Yes, sir.

Q. Did you say anything about wanting all taxes on that store? A. I did. When he gave me the bill, I said "This is all?" He said "Yes."

Q. But you had discovered the preceding year that that bill was all, and there was nothing back? A. Yes, sir.

Q. But you repeated this inquiry. A. Certainly.

Q. What answer was made to you? A. He said yes, that was all.

Q. Then when you gave this check, on May 24, you put on it again, "All, 1901." That is your writing there? A. Yes, sir; it corresponds with that bill. That is all that memorandum is for, is to correspond with the bill.

Q. When was it you first learned anything about these other tax bills that you produced here, the tax bill for 1898 and the one for 1899? A. When I went to pay this check, No. 7923, on May 24, 1901.

Q. That is your second visit to the office? A. Yes, sir; on this amount. I have been there hundreds of times. It was the second time on this branch bill.

Q. What I meant to ask you was whether when you went there with this check, 7923, that was not the second time you had
156 been to the office in connection with any matter at all? A. No, sir.

Q. I understand when you went with check No. 5424, that was the first time you had been there about any matter at all? A. Yes, sir.

Q. Between those times, July 24, 1900 and May 24, 1901, how often had you been to the tax office? A. Probably fifty times.

Q. About what? A. About property Mr. Harry King was receiver for, all over the city, northwest, northeast, southwest and southeast.

Q. But it was the second time you had been in connection with this property? A. This branch property.

Q. What was it called your attention to anything that occurred on that second visit? A. This bill I got on the 21st of May for the taxes of 1900 (referring to Exhibit Rodgers No. 4). I got this bill on the 21st of May, three days before it was paid. On the 24th of May this check, No. 7923, was made out in payment of this bill. I took it over, and three days, as I say, having elapsed, I went to the same window again, and I said, "I am going to pay these taxes now. It is three days since this bill was made out. Is this all right?" He says "Yes." I says "That covers then everything

again?" He says "Yes." I said "All right." He says: "Stop a minute." He says "Here is something back on that." I
157 says, "What? I paid the 1900 taxes last year." He says, "I don't know; there is something back. You go downstairs and you can find out." I didn't pay this check, I went downstairs——

Q. You did not deliver the check? A. No, sir; I went downstairs and I said to one of the clerks there, that waits on that back tax business, I says: "I have been upstairs and got this bill here, and they tell me there is something back of this. I would like to know what it is. Last year they told me that covered everything on the property, and now they tell me there is something back." I says "I would like the bill for everything that is back. I would like to square everything up." He handed me then those three bills.

Q. He handed you then Exhibits Rodgers Nos. 5, 6, and 7? A. Yes, sir; and without paying this check, I went back to the office and showed those bills to Mr. King. I told him, I says: "Here are a lot of back taxes on that branch property that seem not to have been paid." Mr. Harry says: "Oh, you must be mistaken about that." I says "No, I am not. They gave us the bills there, and I looked them up in the books, and I found they hadn't been paid." Then he made out that check No. 7925, dated May 24, 1901. I went over to pay the 1901 taxes with this other check, 7923. This check (No. 7925) was made out for the bill for 1899, and the sublot of the previous year, a little lot there; but they were paid in together. These two checks were paid in together. I
158 carried this (indicating check No. 7923) back to the store with me, and got that check in addition.

Q. You carried back 7923? A. 7923 I had first, and I carried it back to the office and got 7925 made out, and went back and paid the two together.

Q. Was that all done on the same day? A. Yes, sir; it was done within an hour. Within an hour of this check being made out, that was made out.

Q. So they were both made out on the 24th day of May, 1901? A. Yes, sir. I went over to pay this check, but when I found these bills were due, I took it back.

Q. When you say this check, which do you mean? A. 7923 was made out, and I went over to pay it, but finding these things were turned in, I went back and gave it to Mr. Harry and told him, I said "There is a lot more on that, sir. Perhaps you want to destroy this check and make another check;" but he says "Let that go, and I will make another check." They were paid in together, at the same time, as if they were one bill.

By Mr. JOHNSON:

Q. Mr. Rodgers, you were in the employ of the Kings from April 1900 until when? A. Until about June, 1902,—June or July.

Q. You were bookkeeper all that time. A. Yes, sir.
159 Q. Where was your office; in the Seventh Street store or on Market space? A. In what we call the main store, on Seventh street between H and I.

Q. Had you any other duties than bookkeeper? A. No, sir.

Q. That is where the books were kept? A. Yes.

Q. You stated, as I recall it, that you got the description of the property from the ledger? A. Well, from the stub check book, which went into the ledger.

Q. But you stated from the ledger. A. I had to turn to the ledger to get the payment, and then I referred back to the check-book. The ledger shows when the payment was made, and then you can refer to the check book to get the exact item. That always goes on the stub of the check.

Q. Then you did not get the description of the property from the ledger? A. Not lot A; no, sir. I got the payment from the ledger, and the description of the property from the stub of the check.

Q. When you said in your direct examination that when you went and asked for that tax bill, "I always asked for Maria T. Gillis; that was the name in which it was assessed," you were mistaken, were you not? A. No, sir; I always did it after the
160 first payment, when I found, as I say, when I went to the desk——

Q. But when you said you did that on the 24th of July, 1900, you were mistaken? A. No, sir; I am not mistaken.

Mr. DARLINGTON: I think counsel is mistaken. I do not think he said that.

A. What I stated was that I went to the office and I went to the pigeon-hole marked K, and I asked for the tax bill against Mr. King on that lot. They told me they had no such name. I said "Look up the lot and see." He says "It is in the name of Maria T. Gillis." I says "I want the tax on that lot," and he gave me the bill in that name. When I went back to the store, I told Mr. King "It is not made out in your name; it is made out in the name of Maria T. Gillis." He said "That's all right."

Q. These books you kept pertained to both stores, did they? A. Not these ledgers that we allude to now. The ledgers were kept separate. The branch store ledger is kept separate from the other.

Q. You remember these transactions pretty distinctly do you not? A. Yes, sir; I do.

Q. What other taxes did you pay in July 1900? A. I don't know that I paid any.

Q. What other taxes did you pay in May, 1901? A. I couldn't tell that exactly. I was paying taxes all the time. The Kings own property all over the city, coming due at different times, &c.,
161 from the rents they were receiving. There would hardly be a month that I wouldn't be paying taxes.

Q. I understood you to say you went there hundreds of times? A. I think so, to get bills or to pay bills.

Q. Who do you know down there? A. I don't know anybody personally.

Q. How many hundred times do you think you went down there? A. I couldn't say. In the two years that I was with King, I don't think there was ever a week that I wasn't there.

Q. If you went there once a week, that would be 104 times in two years? A. Yes; sometimes I had to go half a dozen times on one bill.

Q. And in all that time you did not make the acquaintance of anybody? A. No, sir.

Q. Did anybody there know you? A. Not that I know of. They know me by sight, I suppose, the same as I know them. I had no conversation with anybody in the place except on this tax bill business.

Q. I want you to tell us please exactly what it was you looked at to get the description of the property, the first time you went to pay it? A. I went and looked at the stub book.

Q. You did not look at a ledger? A. I looked at the ledger to get the date of the payment. I never could have found——

162 Q. What date was that? A. I couldn't tell that. It was some payment made by Mr. Alexander, my predecessor.

Q. Who was he? A. My predecessor.

Q. A bookkeeper? A. Yes, sir.

Q. Was it five years back? A. No, sir; a year back I guess.

Q. 1899? A. I suppose so; about a year back.

Q. Where is that stub? A. It is right in the check book.

Q. Where is that check book? A. That I don't know. It is up in the store.

Q. Where was it when you last saw it? A. I haven't seen it since that last time I looked at it.

Q. Where was it then? A. In the store.

Q. Whose store? A. Caroline King & Sons.

Q. It was in their possession when you left? A. Yes, sir.

Q. You are sure you did not look back three or four years? A. No, sir.

Q. And what you found was undoubtedly the stub of a

163 check in payment of a tax? A. Yes, sir.

Q. And that had the description of the property? A. Yes, sir.

Q. And the amount of the tax? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. You drew a check conforming with the entry on that stub, and went down there? A. That is, giving the lot—giving the lot number and so on.

Q. You did not draw a check? A. No; I went there to get a description of the property, to go and get my bill.

Q. Do you remember you got it from a stub, showing the description of the property? A. Yes, sir; that is my recollection.

Q. And that it was 1899? A. That is my recollection.

Q. You are sure it was not 1898? A. No, it was not 1898.

Q. Are you sure it was not 1897? A. I am sure it was not 1897.

Q. How big are those stubs? I mean how many are there in them, about? A. I should say three inches square.

Q. I mean how many check stubs are there in them? A. I think there are five hundred in a book.

Q. Did you go through more than one book to find them?
164 A. No, sir; I don't need to go through one book. I go through the checks of that time. That is all.

Q. What time did you look for, the July previous? A. The date of the last payment that had been made.

Q. Where did you find that? A. I got the date in the ledger.

Q. So that you got track of the stub from the ledger? A. Yes, sir.

Q. There is no doubt about that? A. No, sir.

Q. And whatever that was in the ledger you referred to the stub conforming to that? A. Yes, sir.

Q. And there you got your description of the property. Is that right? A. Yes, sir.

Q. You said afterwards you looked up some books and found that some other taxes had not been paid? A. I didn't look up any books; no, sir.

Q. You said that in answer to some questions Mr. Perry asked. A. I beg your pardon. I didn't say anything of the kind.

Mr. DARLINGTON: Counsel is in error about that.

By Mr. JOHNSON:

Q. Did you not say, in answer to a question that Mr. Perry asked you, that when they told you in May 1901 that there were other taxes due, you spoke to Mr. King about it, and Mr. King
165 said it could not be, and then you looked up the books and found it had not been paid. A. No, sir.

Q. You did not say that? A. I said part of that, but you left out the best part of what I did say.

Q. Did you say any of that? A. Part of it; yes.

Q. What part did you say? A. I said the last part, but there was plenty I said before it that you have not put in.

Q. Did you say you looked up the book and found the taxes had not been paid? A. Yes, sir.

Q. Is not that what I asked you if you said? A. No, sir; you asked me if I didn't say that? I said plenty besides that.

Q. I know you said plenty besides that. I was asking you if you said that? A. I said that all right.

Q. Was it a ledger you looked over and found the taxes had not been paid? A. Yes, sir.

Q. Did you see again the entry you had previously found in order to locate the property? A. No, sir; I was not looking for that. I don't know that I did.

Q. How many entries of tax payments did you find at that
166 time in the ledger? A. There was only one made when the new books were opened.

Q. What years did that ledger cover? When did it begin? A. It began, I think, in the latter part of 1897.

Q. You now remember there was but one entry of taxes paid in it? A. I think so, as near as I can remember.

Q. You saw that when you first looked at it in July, 1900? A. Yes, sir.

Redirect-examination.

By Mr. TOBRINER:

Q. Mr. Rodgers, you testified that when you went to Tolman's there was a defalcation in the office? A. Yes, sir.

Q. Was that before or after you went there? A. To King's?

Q. No, to Tolman's? A. Was that before I went to King's, do you mean?

Q. Was the defalcation before or after you went there? You said you worked at Tolman's laundry on account of a defalcation there. A. Yes, sir.

167 Q. Did that defalcation take place before you went there? A. Yes, sir; they employed me to find out what the amount was.

Mr. PERRY: The witness himself mentioned the defalcation.

——— ———.

Subscribed and sworn to before me this — day of ———, A. D. 1903.

——— ———,

Examiner in Chancery.

The further taking of these depositions was thereupon adjourned, subject to notice.

168 WASHINGTON, D. C., *March* 12, 1903,—3:15 o'clock p. m.

Met pursuant to notice at the office of Leon Tobriner, Equity building, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendants Cohen and Kann, Mr. Johnson.

Present on behalf of the defendant Webb, Mr. Perry.

JAMES G. RODGERS, was recalled for further direct examination

By Mr. TOBRINER:

Q. Mr. Rodgers, when you testified the other day, you told us that when you went to the tax office on or about the 21st day of July, 1900 to inquire about the taxes for premises No. 715 Market space, you got the lot number and the square or the description of the property from the ledger.

Mr. PERRY: I do not recollect that he testified in that way, Mr. Tobriner.

Mr. DARLINGTON: Yes, he so testified.

Mr. PERRY: I thought he testified that he got the description of the property from the stub-book.

Mr. TOBRINER: He got it first from the ledger and then went to the stub.

By Mr. TOBRINER:

Q. Will you be kind enough to examine these two books
169 (exhibiting two books to the witness) and tell us what they are, first. A. This (indicating) is the ledger containing an account of the money paid out on account of the branch store.

Q. That is, the premises No. 715 Market space? A. Yes, sir. This (indicating) is one of the check-books showing the stubs of the checks for these amounts drawn during the time covered by this check book.

Q. That check books runs from when? A. It runs from the 17th of December, 1897 to the 23rd of February, 1898.

Q. Will you turn to the entry in the ledger from which you testified, as you recollected, that you obtained this description of the property? A. The entry that I referred to at that time is this entry (indicating).

Q. What date? A. The 30th day of December, 1897, and this (indicating) is the stub of a check to which I referred.

Q. On what page does that entry of the 30th day of December, 1897 appear on the ledger? A. On page 690, the particulars not appearing on the ledger but appearing on the stub of the check.

Q. Do you find a description of the property in the ledger the entry of which you have just read? A. No, sir.

Q. Do you find any description there? A. No, sir.

Q. Does that entry refer to the stub of a check book? A.
170 Yes, sir, by the date.

Q. By the date only? A. Yes, sir.

Q. Under date of December 30, 1897, corresponding to this entry in the ledger do you find a stub of the check-book? A. Do I find an entry?

Q. Yes. A. How do you mean?

Q. Is there an entry in the stub of the check book corresponding

to this entry on the ledger? A. Yes, sir; the ledger is posted from that stub.

Q. Give us a copy of the stub in the check book. A. The stub says——

Mr. JOHNSON: One minute. Do you want to offer in evidence what the stub shows?

Mr. DARLINGTON: Yes; we propose, for the convenience of everybody, to have the examiner copy it into the record. We offer in evidence the stub in question and it is agreed between counsel that the examiner may transcribe it into the record, the copy to take the place of the original.

The stub in question is as follows:

No. 387.

Dec. 30 1897

E. G. Davis, tax collector

Branch

Bill in name of Maria T. Gillis

432 of 3
S. A.

1″ half 98
$139.34 Tax 137.96
1% 1.38 .

(413)

171 By Mr. TOBRINER:

Q. What are those figures enclosed in a circle in lead pencil? A. The page of the cash book.

Q. What is it? What is the number? A. Page 413, the page of the cash book.

Q. Mr. Rodgers, can you recall when it was that you first saw this entry on the stub of check No. 387? A. As near as I can fix it now, it was some time in July, 1901.

Q. What was the occasion of your looking at the stub book at that time? A. Mr. King had received a letter from Mr. Wiltsie regarding the tax for the second half of 1898, and he requested me to find every check, the stub of the check and every entry in the ledger connected with all the taxes paid on 715 Market space. That was one of the checks and one of the stubs.

Mr. PERRY: Have you that letter, Mr. Tobriner?

Mr. DARLINGTON: It is in the printed record.

By Mr. TOBRINER:

Q. How often did you look over these stubs and check-books, also the ledger accounts and make an effort to find the checks pertaining to the taxes on this branch property? A. Never before that time.

Q. How often after that time, if at all? A. Well, I had a good deal of trouble finding some of the checks, and I probably went over them once or twice.

Q. In your testimony the other day you testified that
172 you got the description of the property from the ledger entry and this stub book in 1900, on the first occasion that you paid the taxes upon 715 Market space. How do you explain that testimony in view of your present testimony? A. I made a mistake. Now I come to see the check book and the ledger I see that I could not have done that, for I never saw that check book until July, 1901. That check book was something I never had anything to do with. It was my predecessor's book and I never saw it until I came to hunt up these checks.

Q. So that when you went down——

Mr. PERRY: I will have to object to this mode of examination, especially under the circumstances of the witness being recalled. I object to leading questions. Let the witness state what he did.

By Mr. TOBRINER:

Q. What then is your recollection as to what information you had in July, 1900, when you went down to obtain the tax bill upon this property? A. I had no information regarding the square or lot or anything of that kind. I had to get it from them.

Cross examination.

By Mr. PERRY:

Q. Mr. Rodgers, you said in your testimony the other day, upon cross examination, that the first time you went to the tax office in connection with these taxes was on the 24th of July, 1900. That is correct, is it? A. The 21st of July, I think you will find.

173 Q. It is marked here the 24th? A. Well, somewhere about the 21st or 24th.

Q. What is that? A. The check was paid on the 24th.

Q. At whose request did you go? A. Presumably on Mr. King's.

Q. What is your recollection about it, Mr. Rodgers? A. My recollection is that I would not have gone for that information without I had instructions from Mr. King.

Q. What instructions were they? A. To go down and get the tax bill for Market space.

Q. Did you have at that time the lot? A. No, sir.

Q. Then when you said on page 44 that you had the number of

the lot and square on a little slip of paper you were mistaken, were you? A. Yes, sir.

Q. And when you further said, in answer to the question "Where did you get the lot and square on that piece of paper from," "A. From the book; from the ledger," you were mistaken about that? A. Yes, sir.

Q. Can you explain how you could have made that mistake? A. Yes, sir. When I was asked to give my testimony regarding that matter I had had no chance to look up either the ledger or the checks, and I was answering to the best of my recollection. Since then I have thought the matter over; and in the last ten
174 days I have seen the ledger and I have seen the check book, and I am satisfied that I was mistaken.

Q. What is your recollection now as to what you did when you got to the tax office on this 24th day of July, 1900? A. I went to the window marked letter K and I asked for the tax bill for 715 Market space in the name of King.

Q. Whom did you ask that of? A. The clerk that attends to the letter K. I don't know who it was.

Q. Who was that clerk? A. At various times I have been waited on by two gentlemen and a lady. I don't know which one it was.

Q. On this occasion was it a gentleman or a lady? A. I don't know.

Q. Would you recognize that clerk if you saw him or her again? A. I could recognize the whole three, but I could-'t say which one of them waited on me at that time.

Q. What happened next? A. He said "There is no bill here, no tax on 715 Market space in the name of King." I said "I want to pay the taxes on that place. I want to pay the tax on 715 Market space."

Q. What did you ask him for? A. I asked him for the bill.

Q. On what? A. The tax bill on 715 Market space.

Q. Where did you get 715 Market space from? A. That
175 is our branch store.

Q. You knew that, did you? A. Yes, sir.

Q. When you asked him for that, did he look to see what 715 Market space represented, what it corresponded to? A. He looked for King in his book.

Q. How did he come to look for King? A. Because I asked him in the name of King. I suppose it was in the name of King.

Q. What did he say? A. He said "There is no such place in the name of King." I said "I want a bill for that property."

Q. He said there was no such place in the name of King? A. Yes, sir.

Q. What else did you ask him then? A. I said "That is what I want the bill for, that property, anyway."

Q. 715 Market space? A. Yes, sir.

Q. What happened next? A. Then he went over to his chart,

or the book he has in the back of his store. He looked for 715 Market space and came over and gave me a bill in the name of Maria T. Gillis.

Q. You were standing there at the window looking at what was going on? A. Yes, sir.

Q. What part of the place did he go to? A. He went right straight back from the pigeon-hole to the other side of the room, back of him.

176 Q. He went right straight back of him, did he? A. Yes, sir.

Q. You say he looked at a chart? A. Yes, sir, he looked at a chart.

Q. I understand by a chart something in the nature of a map against the wall. A. Oh no; sir; some index he has there.

Q. Do you mean a book? A. A map.

Q. Do you mean a map or a book? A. A book of maps, I guess. I don't know what it was exactly.

Q. You were standing there looking at him when he went back? A. Yes, sir.

Q. He looked at a book? A. Yes, sir.

Q. Did he open the covers of the book? A. Yes, sir.

Q. He appeared to find something there, did he? A. Yes, sir.

Q. What did he come back then and tell you? A. He says "It is not in the name of King. It is in the name of Maria T. Gillis."

Q. What did he tell you about 715 Market space? A. He told me nothing but the square——

Q. Did he tell you what lot and square it was? A. Yes, sir.

Q. What lot and square did he say it was? A. I don't

177 remember that.

Q. You cannot remember that? A. No, sir.

Q. Do you know now what lot and square it was? A. No, not without referring to the checks I have made out for it.

Q. What else did he tell you? A. He gave me the bill for 1900.

Q. In whose name was the bill? A. Maria T. Gillis.

Q. He went to work then and made out the bill, did he? A. Yes.

Q. Before you went up to pay this bill, Mr. Rodgers, did you look at the ledger to see when the last payment of taxes had been made? A. No, sir.

Q. You did not look at anything? A. No, sir; it was the first bill I had paid, you see I had only been there a short time, and I supposed of course everything was up and it wasn't necessary for me to look up. I got the check and went over with it and paid it.

Q. This (indicating) is the check that you produced the other day, I believe, dated July 24th, 1900? A. Yes, sir, that is the check.

Q. So down to that point you had not looked at the ledger at all to see what that showed about the payment of taxes on this property? A. No, sir.

Q. In 1901, when you went to pay this second tax bill, did
178 you look at the ledger? A. No, sir.

Q. What did you do? A. I knew the taxes of 1900 had been paid, because I paid them myself. I simply looked up the tax receipt to get the lot and square number.

Q. Did you take the tax receipt up with you? A. For 1900?

Q. Yes. A. No; I made out the check. I went and got the bill for them, you know, for 1901.

Q. You got the bill from whom? A. From the tax office.

Q. You first went up and got the bill, did you? A. Yes, sir.

Q. What did you ask for on the second occasion? A. I asked them under the lot and square number.

Q. How did you remember that? A. I got it from the receipt of the previous year, 1900.

Q. That is what I asked you a moment ago. You had it in your possession? A. Yes, sir.

Q. What sort of receipt was it they gave you? A. A regular tax bill.

Q. A regular tax bill receipt? A. Yes, sir.

Q. Had you kept that from the preceding year? A. Yes, sir; we file all those.

Q. You filed it and you got it from that? A. Yes, sir.

179 Q. Did you see the same clerk on that occasion? A. I couldn't say that.

Q. How often had you been there in the meantime? A. A good many times during that year, probably thirty or forty times.

Q. Had you come to recognize the different persons who waited on you? A. I recognized them by sight; yes, I would here or in any crowd.

Q. You testified the other day that when you went up there the second time or rather when you went up there to pay this tax bill of 1901, you were informed on the very day that you went up that there were back taxes due and that thereupon you did not deliver the check that you had taken up? A. Yes, sir.

Q. But came back with that check and had another one made out by Mr. King that very same day? A. Yes, sir.

Q. You had another one made out for the sum of $385.39 which is filed in this case, marked "Rodgers No. 8," in payment of the bills that are annexed to that check, and which are for the years 1898 and 1899? A. Yes, sir.

Q. That is correct, is it? A. Yes.

Q. Or do you want to alter that testimony in any way? A. No, sir.

Q. Did you then look at your ledger at all? A. No, sir; not at that time.

180 Q. You had your attention called to the fact that although you had paid the taxes for 1900 and 1901, nevertheless the taxes for 1898 and 1899 remained unpaid? A. Yes, sir.

Q. Did you call Mr. King's attention to that? You said the other

day you called his attention to the fact that it was unpaid? A. Yes, sir; when he gave me the check.

Q. Did you look at your ledger to find out when the last payment was made? A. No, sir; not then. The time was very short to get back, and I got the check and went back to the office.

Q. When you came back again the next time did you look again to find out whether anything else was unpaid? A. No, sir; I don't think I did.

Q. You say the occasion when you did look at the ledger was when a letter had been received from Mr. Wiltsie? A. Yes, sir.

Mr. PERRY: Are you not mistaken about that letter being in the record?

Mr. DARLINGTON: I may be mistaken about that. Mr. Tobriner has the letter itself.

By Mr. PERRY:

Q. Is that the letter to which you refer (indicating)? A. I believe it is.

The letter referred to was offered in evidence by counsel for the defendant, marked "Rodgers No. 9."

181 By Mr. PERRY:

Q. This letter is dated July 24, 1901. Will you look at the paper I now show you, marked "Exhibit Cohen No. 2," on page 52 of the Record, and state whether or not that is the reply Mr. Wiltsie wrote to that letter? A. I didn't see the reply.

Q. You cannot tell then? A. No, sir.

Q. How soon did Mr. King reply to it; do you know? A. I couldn't tell you that, sir. I had nothing to do with the replies.

Q. As soon as that letter was received you say you were directed to look up the ledger? A. Yes, sir.

Q. Will you please turn to this ledger account which is in evidence and say where you began the search? A. At the first entry made under the name of the branch which is the opening of the branch account on September, 1897.

182 Q. September 1st, 1897? A. Yes. This is a double ledger, so it goes down here and commences here again (indicating).

Q. What was the first entry you found on that ledger under the head of branch, relating to taxes? A. There it is, sir (indicating).

Q. And this one you have already testified about showed that on December 30, 1897, check No. what? A. The number of the check is not on the ledger.

Q. Well, a check for what? A. A check for the taxes for the first half of 1898.

Q. Where does that appear? A. That appears on the stub of the check book.

Q. I am asking you about the ledger entry, Mr. Rodgers. A. The ledger doesn't show. Yes, it does—"First half of 1898."

Q. $137.96, was it? A. Yes, sir, and penalty 1 per cent., which is $1.38 for the first half of 1898. This is not my entry.

Q. I understand. That is not in your handwriting? A. No, sir.

Q. Did you go any further than that? A. Yes, sir; I followed it right straight through.

Q. What did you find on the ledger as the next payment on account of taxes? Just look at it and see. A. The next payment was my payment in 1900.

Q. Did you find any intervening payments between that entry you have just called attention to and the payment you made in June, 1900? A. No, sir.

183 Q. Is this the only account on the ledger into which those items enter? A. Yes, sir; that is the only account on this ledger.

By Mr. JOHNSON:

Q. Were you living in Washington in November, 1897? A. Yes, sir.

Q. Did you know the Kings at that time? A. No, sir.

Q. When did you see that ledger last before to-day? A. Yesterday.

Q. And when before that? A. Not since I left the Kings, about July, 1901. I haven't seen it since I left their store, until yesterday.

Mr. DARLINGTON: Was that 1901?

A. Yes, some time about July, 1901. I haven't seen the ledger until yesterday.

By Mr. JOHNSON:

Q. You left there in June, 1902? A. 1902; yes.

Q. You mean in 1902 you last saw it? A. Yes, sir.

Q. And you did not see it again until yesterday? A. Yesterday.

Q. How late does that ledger run? A. It ran up to the time I left. I suppose presumably it runs up to date.

184 Q. That one book? A. I guess so.

Mr. TOBRINGER: Look at it, Mr. Rodgers.

A. It is a double ruled ledger, and will run for a good many years if you like to keep it going. It runs up to March 9, 1903—that is, that account.

By Mr. JOHNSON:

Q. What was it made you think that you wrote the description of that piece of property on a piece of paper the first time you went down to the tax office? A. Well, I must have got that confounded with the time that we searched up these checks, after we went through the accounts. Of course I referred to each check stub, and I found that they were properly described and everything was right, and I must have got it confounded with that; but I was satisfied before I saw the ledger yesterday. Since I gave my testimony I

have been thinking about it considerably and I am satisfied I could not have got those figures from that check book, for last night I saw that check-book, and it is the first time I have seen it. The first time I ever saw that check used by Mr. Alexander was when we made this examination of the checks that had been paid. I never saw that check before, and I had no occasion to see it or to use it in any way.

Q. So that it is your belief now that you never did write the description on a slip of paper and take it down there with you? A. No, I did not. I can remember distinctly asking him for the lot and square number—distinctly.

Q. Do you remember pretty well all the entries that were in that ledger relating to taxes during the time you were there as
185 book-keeper? A. Yes, sir; I made every entry myself.

Q. I say you remember them all? A. Yes, sir.

Q. Do you remember them now? A. Yes, sir.

Q. And without looking at the ledger to refresh your recollection? A. I can give you the dates.

Q. I say without looking at the ledger to refresh your recollection? A. Yes. That is, I can't give you the dollars and cents. I can give you the dates of the entries.

Q. And you remembered those when you were here and testified before? A. Yes, sir.

Q. How many entries were there in that ledger of tax payments? A. Three.

Q. Can you remember the dates? A. Four. One was in 1902. That, I guess, has not been brought into this controversy.

Q. And you have remembered those items and those dates ever since June, 1902? A. No; I haven't remembered them ever since then. I have remembered them after refreshing my memory by looking at the checks.

Q. I am asking you about your recollection of the ledger.
186 A. Yes, sir, the entries were made on the dates those payments were made, and they were entered by me in the ledger.

Q. I am asking you about your recollection, your memory of the ledger, and what is in it. I understand you to say you remember what is in the ledger? A. Yes, sir. Every one of those entries were made in the ledger by me, and I remember distinctly making them.

Q. And you remember them here, and you remembered them all this time? A. Yes, sir.

Q. When you testified here last did you remember them? A. Yes, sir.

Q. You remembered what was in the ledger? A. Yes, sir; not the amount, as I say.

Q. But the dates? A. But the dates.

Q. Can you tell us what it was that fixed it so in your memory that you can remember the items that were in that ledger all that time? A. The search through this ledger in July, 1901. I had to

fix those checks in such order and had such work—we worked there for several days getting these checks into order. They fixed themselves so distinctly on my mind that I couldn't forget. I could give you the same particulars about the checks drawn by Mr. Alexander, *but* I can about all those that were drawn by me.

Q. I am not asking you about checks. I am asking you about what the ledger shows. A. I mean by the entry in the ledger, the same thing.

187 Q. You claim to remember what the ledger showed irrespective of whether you made the entry or not? A. Nobody made an entry but myself while I was there. No entry was made in that ledger while I was in the employ of Caroline King & Sons but myself—no entry.

Q. Are there no entries in the ledger relating to taxes made by any one else than you? A. No, sir, nobody else ever made an entry in that ledger while I was there but myself.

Q. Did anybody make entries in it before you were there? A. Yes, sir; my predecessor.

Q. Then there were entries in the ledger that you did not make relating to taxes? A. Yes, sir.

Q. And you remember those? A. I remember one entry made in that ledger; yes, sir.

Q. And without seeing that ledger for more than two years, you were able to tell us the last time you were here that there was but one entry of taxes in it at that time? A. Yes, sir.

Q. How many entries are there?

Mr. DARLINGTON: I have not objected so far, but I think Mr. Johnson's arithmetic is a little at fault. The examination by which the witness says these dates were impressed on his mind was July, 1901, and he is testifying in March, 1903, which is not two years.

By Mr. JOHNSON:

Q. Do you remember any of the other entries in that ledger
188 except tax entries? A. I remember plenty of entries, but not the particulars, because we have never had any occasion to hunt them up and search them, as we have this matter,—rent for instance. I know the dates of every one of those entries for rent, because it was a steady date that those rents were paid.

Q. The first time you went to the tax office you went to the K window? A. Yes, sir.

Q. Was the first person you saw a man or a woman? A. I presume a man.

Q. What memory have you of it? A. My memory is it was a man.

Q. Did you get the tax bill at that window or did you go to another window? A. I got it at that window.

Q. Did you not tell us when you testified the last time that they sent you to another window, a different window from the K window,

and that you got it there? A. I don't know that I did. I think I got it at that window.

Q. What is your recollection as to what you testified to the last time on the subject? A. I have no recollection. I couldn't say.

Q. Did you see the person, whoever it was, make out the bill? A. Yes, sir.

Q. Was the tax book there on the desk from which he
189 made it? A. I couldn't say. When I say I saw him make out the bill, I doubt whether he did make out the bill. I think he went to a box and turned over a whole lot of bills already made out, and picked out that bill.

Q. Already made out? A. I think so. My recollection now is he did not make out a bill; that he went over there to an open box he has there and turned over and turned over until he came to this bill and picked it out and handed it to me. That is as near as I can remember now.

Q. Did you have the check with you then? A. No, sir.

Q. Or did you go back? A. I went back to get the check.

Q. And your recollection is that there was no writing done on that occasion? The bill was already written out and ready? A. I think the bill was already written out.

Q. Where was that box? A. Right on the table, close beside the desk that holds the book with the records, where you get all your information from. They have a book for each letter. They turn to the name of the person owning the property, and that gives them all the information on that book.

Q. This box was by that book? A. The box was on a table, about four feet back of it.

Q. What kind of a box was it? A. An open box, with bills all standing in, one beside the other.

190 Q. Edgewise? A. Edgewise, I think.

Q. This was a wooden box, was it, or tin? A. A wooden box, I think as near as I remember it.

Q. Were you able to see any of the other bills? A. Why, no, sir. He only brought me over the one. I could only see them from a distance. I am testifying to the best of my recollection. Those things didn't make any impression on my mind at the time particularly. My object was to get the bill, and I got it.

Q. I want to see if I have that thing straight as to your present recollection. You have thought about it since you testified last? A. Yes, sir.

Q. And your present recollection is that you went there and asked for a bill in the name of King? A. Yes, sir.

Q. And that the man you saw examined a book and said that that property was not in the name of King? A. Yes, sir.

Q. Then he went and consulted another book and told you that it was in the name of Maria Gillis? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. Then he went to this box and looked over a lot of bills in it

that were on edge, took out one of them and handed it to you? A. Yes, sir; that is my recollection.

191 Q. And no writing was done that you saw? A. I don't think so.

Q. And then you took the bill and carried it up to the store? A. Yes, sir.

Q. And got the check? A. Yes, sir.

Q. Did you come back and pay it yourself? A. I paid it.

Q. You brought it back and paid it? A. Yes, sir.

Q. Did you show it to anybody at the store? A. It was not my custom to show——

Q. I want to know if you remember that you did? A. I couldn't say that I did. I couldn't say I did not. I don't remember.

Q. How long before you went down there to get that bill had you been told by anybody to do it? A. Probably five minutes. I would like to say here that these persons that waited on the window K also waited on the other windows. They were just as likely to wait on G as on K or anything else. They would just simply get up, and when there is a crowd at either window they go to another t—the same clerks. There is no clerks that attended to each particular window, so far as I saw.

Q. Had you ever been there to get any tax bill in regard to any property before that time? A. 1900?

Q. Yes; that first time? —. ——.

192 Q. That was your first visit to the tax office for any purpose? A. Yes.

Q. And it was the first time you were asked by anybody in Mr. King's establishment to go and get a tax bill and pay the tax? A. I believe it was; yes, sir.

Q. You went within five minutes? A. Immediately he told me.

Q. Did Mr. King tell you where to go? A. No, sir.

Q. Did he tell you what to ask for? A. Yes; he told me he wanted to pay the taxes on the branch.

Q. He told you to go and get the tax bill for the branch store? A. Yes, sir.

Q. Which Mr. King told you that? A. Mr. Harry King.

Q. Did he tell you of any one to apply to for it? A. No, sir.

Q. Did he tell you the bill would be ready for you? A. No, sir; I don't think he knew anything about it.

Q. Let me ask you if you did not make another mistake when you testified here before. When you testified the last time, you stated that on that first occasion you asked for all the taxes on the property? A. Yes, sir.

Q. Everything up to that date; and they told you that
193 that was all, there were no back taxes? A. I testified that after he had given me the bill I asked him if this was all and he said yes. I said "Does this cover everything?" Being the first time I had ever paid any taxes there I wished to put myself

straight, and I asked him "Does this cover everything" and he said "Yes."

Q. So that you were not mistaken in making that statement? A. No, sir.

Q. You had not been told to inquire for any overdue taxes? A. No, sir.

Q. And you are reasonably certain now it was a man who gave you the bill? A. Pretty certain; yes, sir, because a woman was there and never waited on me but once, and I don't know that that was the time.

Q. A woman waited on you more than once? A. Yes, sir.

Q. Do you remember her appearance? A. Yes; a stout middle-aged woman.

Q. A stout lady? A. Yes, sir.

Q. A little bit gray? A. I think she is slightly gray. A woman, I should judge about forty years of age, a stout woman, very pleasant in her manner; but that time she saw me was in connection with other property, not the branch store.

Q. At the time she waited on you, did she make out the
194 bill herself? A. Yes, she did, some of them. I think some of them were made out and some of them she made out.

Q. But she did make out some? A. Yes, sir.

Q. Were any bills made out in your presence, or were they all taken out of that box? A. They were very often made out in my presence.

Q. I mean on the branch store? A. No, sir; not there, because there was no interest to calculate, and therefore the bills were ready. Where they have to figure interest, they ask me when I want the interest calculated to, and I tell them. In that bill of July 24, 1901 there was some interest to figure, and in that case you see they had to do some figuring. The bill was made out, and I got that; but on the first bill there was no interest figured, and therefore they had nothing to add to it.

Q. On the first bill there was nothing but the straight taxes? A. Yes, sir, no penalty.

Q. And no interest? A. No, sir.

Q. None of that writing on the check stub that has been offered in evidence here is in your handwriting? A. Of the 30th of December?

Q. Yes. A. No, sir.

Q. You got all your tax bills in one room always? A. At the store?

195 Q. No, at the tax office. A. No, sir; I got all the taxes for the current year in one room, and the back taxes you get in the delinquent office below.

JAMES G. RODGERS.

Subscribed and sworn to before me this 13th, day of May 1904.

JOHN W. HULSE,
Examiner in Chancery.

196 JOSEPH KING, a witness of lawful age, called by and on behalf of the plaintiff, having been first duly sworn, is examined

By Mr. DARLINGTON:

Q. Please give your full name? A. Joseph King.

Q. Where are you employed? A. 715 Market space.

Q. Who is the manager of that business? A. I am the manager of the business 715 Market space.

Q. How long have you known that property? A. For the last fifteen years.

Q. When you first knew it, who occupied it? A. Mr. Stiebel, and my father.

Q. How long did Mr. Stiebel continue connected with it? A. About five years.

Q. How long did your father remain there? A. Did I have possession?

Q. No; how long did your father remain interested in the business? A. He withdrew, I think, three or four years before that.

Q. Before when? A. Before Mr. Stiebel had it for himself.

Q. At the time of your father's death, was he interested there? A. Yes, sir.

197 Q. How long had he been connected with it? A. How long had my father been connected with it?

Q. Yes. A. About four or five years.

Q. So, if I understand you, your father was connected with it at two different times? A. Yes, sir.

Q. When you first knew those premises, what portions of them were used for store purposes? A. The first and second floors.

Q. How were they connected, those two floors? A. The first was connected by a front entrance and a back entrance.

Q. Of what did the back entrance consist? A. Of the first and second floors, for the store rooms.

Q. Of what did the back entrance consist? What was the thing you called the back entrance? A. The stairway.

Q. Running from where to where? A. From the first floor to the second.

Q. Where did it start from? A. It started from the back of the store.

Q. In the store room? A. In the store room.

Q. How long have those two floors been used for store purposes within your knowledge? A. As long as I can remember, sir; all my life time they have been there.

198 Q. When you first knew the premises, what was the third floor used for? A. For a dwelling.

Q. And for what other purposes has the third floor been used within your knowledge? A. Only for that purpose, sir.

Q. When not used for that purpose how was it occupied? A. It is unoccupied, sir.

Q. It is charged in the pleadings, Mr. King, that your mother destroyed the front entrance to these premises. Can you tell us of any changes made by her? A. Yes, sir; we put in a new front there t—took away the hallway and made a general improvement on the first and second floors.

Q. When was that? A. In the spring of 1898.

Q. Do you know whether Mrs. Marianne A. B. Kennedy was aware of these changes? A. Yes, sir.

Q. What do you know, Mr. King, of Mrs. Kennedy's knowledge of this change in the front? A. From my two brothers.

Q. Did you ever see her there afterwards? A. Quite often.

Q. Please state whether on any occasion after these changes she and you talked about them? A. She was in, and I took her through the first floor and through the second floor, and she congratulated us upon the fine showing of the establishment—what a fine improvement it was.

199 Q. Mr. King, did you and Mrs. Kennedy ever have any conversation about the taxes on this property? A. Yes, sir.

Q. How often? A. Only once, to my recollection.

Q. When was that? A. It was in 1897.

Q. What time in 1897? A. A couple of days before Christmas.

Q. What enables you to know it was in 1897? A. Because she had come in and it was at the time of my father's death that year, and the first opportunity she had to come in and extend her condolence and different things of that kind. She was very sorry to hear of it.

Q. Did she speak of your father? A. She spoke of him and said that she missed a very good friend and also a very dear friend.

Q. What, if anything, did she say of him then in respect of his having been her tenant? A. She always said he was an elegant tenant, and she would miss him very much.

Q. On this occasion did she say anything about him as a tenant —on this occasion in December, 1897? A. Yes, sir, she spoke very highly of him and also said he had always paid his rent prompt and everything.

Q. She spoke of that on this occasion? A. Yes, sir.

Q. What did she say about taxes on that occasion? A. She told me she had neglected to notify us in reference to the taxes,

200 and if we wouldn't have them paid, and I said I would go up and tell my brother and notify him at once; that she needn't worry, it would be attended to.

Q. Did you notify your brother? A. Yes, sir; I went that night and told my brother, Mr. Harry King.

Q. That is the only occasion you recall that she discussed taxes with you? A. Yes, sir.

Cross-examination.

By Mr. PERRY:

Q. When was it your father died? A. In 1897, sir; August 15th.

Q. And this was shortly before Christmas? A. Yes, sir.

Q. And this was the first time you had seen her, you say? A. At that time; yes, sir.

Q. What was your position in the store at that time? A. Manager.

Q. Was your brother, Mr. Harry King, there? A. No, sir; I am the only person.

Q. You are the manager of that branch? A. Of that branch, sir.

Q. Was your mother there? A. No, sir; nobody but myself.

Q. You yourself carried on the business there? A. Yes, sir.

Q. Who spoke first about taxes? A. Mrs. Kennedy.

201 Q. In what connection did she mention that? A. She came in and she asked me if I wouldn't see that the taxes were attended to, that she had neglected in notifying my brother—notifying us.

Q. What was it? Please take your time and tell us what language she used about it? A. Well, she said she had forgot to notify us and she would like to have it attended to.

Q. She had forgotten to notify you about what? A. About the taxes.

Q. Did she speak of any taxes that were due in 1897? This was just before Christmas, 1897, you say? A. Yes, sir.

Q. What taxes did she speak of? A. She spoke of taxes of 1897, sir.

Q. Due in November, 1897, the preceding November? A. Yes, sir.

Q. What did she say about that? A. She said she had neglected in notifying us.

Q. Neglected to notify you about what? A. About the taxes.

Q. That they were due or unpaid or what? A. That they were due.

Q. She had neglected to notify you that those taxes for November, 1897 were due? A. Yes, sir.

Q. What next did she say? A. And would we please see that they were paid.

Q. What? A. See that they were paid.

202 Q. I do not understand you. Do you mean she asked you if you would see that they were paid? A. She said "Would you please see that they were paid" and I said I would attend to it.

Q. Is that all? A. That is all, sir.

By Mr. JOHNSON:

Q. Are you able to fix how near to Christmas that was? A. A couple of days I think.

Q. Did I understand you to say you had not seen her before? A. Oh, I had seen her quite often.

Q. Was she alone? A. Yes, sir; she was alone.

Q. Do you know what time of day that was? A. I haven't the slightest idea, sir.

Q. Can you tell us whether it was in the morning or evening? A. I am positive it was around in the morning, sir; about 11 or 12 o'clock, somewhere around there.

Q. Where were you in the store? A. I was down in the front part of the store.

Q. And the conversation occurred there? A. The conversation occurred there.

Q. Near the door? A. Near the door.

Q. Did she come in a carriage? A. Well, I don't know, sir. I didn't take notice of that.

203 Q. Did you see her out? A. Did I see her out?

Q. Yes. A. No, sir; I did not.

Q. You did not go to the door with her? A. No, sir; I just stood there, as we were very busy.

JOSEPH KING.

Subscribed and sworn to before me this 13th. day of May 1903.

JOHN W. HULSE,
Examiner in Chancery.

The further taking of these depositions was thereupon adjourned until Friday, March 13th, 1903, at 1:30 o'clock p. m.

204 WASHINGTON, D. C.,
FRIDAY, *March* 13, 1903—1:30 o'clock p. m.

Met pursuant to adjournment at the office of Leon Tobriner, Equity building, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendants Cohen and Kann, Mr. Johnson.

Present on behalf of the defendant Webb, Mr. Perry.

ELDRED G. DAVIS, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. TOBRINER:

Q. What is your name and occupation? A. My name is Eldred G. Davis. I am collector of taxes for the District of Columbia.

Q. Since what time have you been collector of taxes for the District? A. Since May, 1888.

Q. Have you with you the books showing the sales made by you, as collector of taxes, for delinquent taxes from April 12th to April 19th, 1899? A. I have the book relating to the main portion of that sale, but not all of it. I have the part which includes the sale of lot A in square 432.

205 Q. Do those books show the payments made by purchasers as well as the time at which the purchasers settled for their purchase? A. I have a memorandum book, which is really not an official book. It is a book in which we keep a memorandum of the moneys that were paid in; that is to say, if you will allow me to explain a little more particularly, when strangers were bidding we require them to make a deposit before the sale commences, as an earnest of their intention to take what they buy and settle for it.

Q. Have you any book in your office which will show when the payments for the respective lots sold, were made? A. This book will show as well as any other and more in detail than any other. The whole sale is entered on our books, after the sale is over, in one lump, and it is deposited in that way; but the detailed amounts paid prior to that I have in the book I have here, from which I can give you the date.

Q. Will you be kind enough to look at the book you refer to and state when C. H. Wiltsie paid the amount of his purchase money for sub-lot A in square 432?

Mr. JOHNSON: I object to this inquiry as the time of payment is immaterial and irrelevant and is not made an issue in the pleadings.

A. This (indicating) is the book in which is entered the payments of money made by persons who propose to bid on property at the tax sale; and in a good many instances the parties, when they bid, or at the time they buy, want to pay right at that time. They

206 make their payment and we give them credit in this book. Then, as soon as we can furnish a certificate to them, we deliver the certificate. We give them a receipt for this money, which they hold until we deliver the certificate. It is not always a payment for every lot. Mr. Tobriner asked me in regard to Mr. Wiltsie. Mr. Wiltsie bought a great deal of property that year. He was a stranger to us and we required that he should make a deposit prior to the sale as an earnest of good faith. Of course what portion of that deposit or of any subsequent money that he paid applied to this particular lot I could not very well determine, because he paid in large amounts.

By Mr. JOHNSON:

Q. Is that book kept by you? A. It is kept by Mr. Collins.

Q. Is that the book which you say is not official? A. We do not consider it exactly an official book; but it has in it these entries relating to tax sales. The entire tax sale is entered up after the sale, on the books, in one amount and it is deposited.

By Mr. TOBRINER:

Q. Is that the book on which you rely for the purpose of ascertaining the amounts of the various purchases and the payments? A. Yes.

Q. What other book of record have you which will show these various payments by purchasers, and the time when payments were made, besides this one? A. This is the only book which shows when payments were made. That book (indicating a book
207 called "Record of sale for taxes" will show the amounts. When we notify them that certificates are ready they come in and pay. This book, from which I am now testifying, is called and designated "Real estate tax sale of the District of Columbia, taxes levied and in arrears July 1st, 1898."

Mr. JOHNSON: I make a further objection to the question as to whether the book referred to shows the amount paid by C. H. Wiltsie for the purchase of sub-lot A in square 432 because, according to the statement of the witness, the book which he has does not purport to show the fact to which the question is directed. I waive any objection to the book growing out of the fact that it was not kept by the witness himself, so far as I am concerned.

By Mr. TOBRINER:

Q. You say that purchasers who bought a great number of pieces of property after the sale were required to make a deposit as earnest money that they would comply with their purchase? A. Yes.

Q. Was Mr. C. H. Wiltsie among the number who were required to make such a deposit? A. Yes, sir.

Q. What was the first day of your sale in the year 1899? A. The 12th of April, I think.

Q. Can you state whether Mr. Wiltsie made a deposit at that time or thereafter? A. Yes, sir; he made a deposit at that time; on the 12th of April.

208 Q. On the 12th of April? A. Yes, sir.

Q. Of how much money? A. He made a deposit of $10,000 on the 12th of April.

Q. Is that the first payment that he made on account of his purchases? A. Yes, sir, according to this book, and I think this book is correct.

Q. When did he make the next deposit or payment? A. The final payment he made May 8th, according to this book.

Q. Of the same year? A. Yes, sir; of the same year.

Q. Was that the succeeding payment to the one he made on the 12th of April? A. Yes, sir.

Q. Can you state from your book the amount of his purchases on the 12th of April, 1899?

Mr. JOHNSON: It is understood that all this comes in subject to my objection?

Mr. DARLINGTON: Yes.

A. I think I can approximately, if not exactly. (The witness examines the book.) The footing of his purchases on the 12th day of April is about $4,000 or probably a little over. I would have to add them all up in order to find out accurately. Some of the sales on the 13th are entered here and some have been ruled out that we, probably, did not get for some reason and so you would have to take a little off from that amount. $4,000 would be approximately
209 the amount of purchases on the first day, the 12th of April.

Q. How do you arrive at the footing of $4,000 or thereabouts; is there anything in the book which shows that? A. Yes—excuse me, I think I have made a mistake and have misstated the figures. Instead of being a little over $4,000 it is $45,000. Some of that was in the 13th so that it would probably make, for the purchases of the 12th approximately $44,000.

Q. Can you state the amount of Mr. Wiltsie's purchases on the 13th? A. It would be about $32,000 or $33,000.

Q. State the amount of his purchases on the 14th. A. About $22,000.

Q. And on the next day, the 15th? A. I am making the calculation here in my head and I may make a mistake. Can I not submit to you all the amount of his purchases or the approximate amount? Will that answer your purpose?

Q. After a while. A. Well, I cannot stand by these figures.

Q. I only want the approximate amount. A. The last I gave you was for the 14th. It was probably $15,000 on the 15th.

Q. Can you tell us on what day sub-lot A and the improvements thereon, in square 432, assessed in the name of Maria T. Gillis was sold? A. It was sold on the 13th day of April, the second day of the sale.

Q. I observe you have another book with you, marked
210 *marked* "Record of sale for taxes volume 1, 1898, collector's office D.C." Will you be kind enough to state what that is? A. This is the volume containing the actual papers that are required to be furnished to the record office for record by the collector of taxes. After they are recorded they are returned to our office and for better security we have them bound in volumes of that kind.

Q. How long have you had this volume in your possession? A. I do not remember exactly how long the record office kept them; but as soon as they returned them to us, after being recorded we had them bound and have had them in our office ever since.

Q. Is there anything about that book or volume from which you can ascertain when you received them? A. When I received the papers—no, sir. We do not make a record of that. I know when they were sent over.

Q. Is this the report of the tax sale made April 12th to 19th, 1899? A. Yes, sir.

Q. On what page does sub-lot A and improvements in square 432 appear? A. On page 272.

Q. Is this the volume that was left in the office of the recorder of

deeds, and afterwards returned to you? A. Yes; the papers contained in that volume were left there but they were not bound at that time. They were in separate sheets.

211 Q. So that this is the report? A. Yes, sir, this is the report.

Q. This is the only report that you left in the recorder of deeds office? A. Yes, sir.

Mr. TORRINER: I offer in evidence page 272 of the report referred to.

It is stipulated by and between counsel that the said page 272 of the report referred to may be copied into the record by the examiner and that a duplicate and compared copy thereof may be filed herewith.

The above mentioned paper is marked Exhibit E. G. D. No. 1 and is in the words and figures following to wit:

212 *Real Estate Tax Sale, District of Columbia, April —, 1899.* 272.

Date.	Property sold.	Items of sale.	Amount sold for.	Purchaser.
April 13	1.....	All tax for year 1898.	118 50	C. H. Wiltsie.
		Penalty.....	16 59	
	Square 429:	Watermain tax:		
	Part lot 1 & imp'ts.	Interest from	....	
	To whom assessed,	Assessment for.....	.....	
	Mary A. Keyworth.....	Interest from	.....	
		Advertising.....	1 20	
			•136 29	
	Square 431:	2nd half tax for year		
	Lot 4 & imp'ts	1898.....	179 16	C. H. Wiltsie.
	To whom assessed,	Penalty.....	19 71	
	Patrick Cavanaugh.....	Watermain tax:		
		Interest from.....	.....	
		Assessment for.....	.....	
		Interest from.....	.....	
		Advertising.....	1 20	
			200 07	
	Square 432:	2nd half of tax for		
	Sub lot A & imp'ts.	year 1898.....	128 50	Do.
	To whom assessed,	Penalty.....	14 13	
	Maria T. Gilliss..	Watermain tax:		
		Interest from.....	....	
		Assessment for.....	... .	
		Interest from.....	.....	
		Advertising.....	1 20	
			143 83	

Real Estate Tax Sale, District of Columbia, April —, 1899. 272.—Continued.

Date.	Property sold.	Items of sale.	Amount sold for.	Purchaser.
Paid. †	[Square 435:]*	[All tax for year 1898]*	[17 19]*	Do.
	[S. ½ sub lot 27 & imp'ts]*	[Penalty]*	[2 41]*	
213	[To whom assessed, Charles Allen]*	[Watermain tax:]*		
		[Interest from]*		
		[Assessment for paving alley]*	[2 94]*	
		[Interest from April 7, 1898]*	[6 47]*	
		[Advertising and costs (35c.)]*	[1 55]*	
			30 56	
		All tax for year 1898.	56 25	C. H. Wiltsie.
		Penalty	7 88	
	Square 435:	Watermain tax:		
	Sub lot 22 & imp'ts.	Interest from		
	To whom assessed, James W. Barker.	Assessment for		
		Interest from		
		Advertising	1 20	
			65 33	

[A true copy of the original on file in this office.]*

[E. G. DAVIS,]*
[*Collector of Taxes, D. C.*]*

[* Words and figures enclosed in brackets erased in copy.]
[† In pencil in copy.]

214 Cross examination.

By Mr. JOHNSON:

Q. I do not suppose you have any personal recollection of any one of these sales? A. No, sir; I cannot say that I have.

Q. Do you remember having given to Mr. Wiltsie a certificate of sale for the purchase by him at the tax sale of this sub-lot A in square 432? A. The records show that Mr. Wiltsie received from our office a certificate duly executed for the sale of that lot.

Q. You had to sign that certificate? A. I signed it, but of course I could not remember that particular one.

Q. You have no personal recollection? A. No, sir; I issued about 5,000 that year—more or less.

Q. Have you any idea of the total amount of sales of property to others than the District? A. In that year?

Q. Yes, sir. A. There was one hundred and fifty odd thousand dollars. I think I have the amount right here (examining the

book). It was $155,104.51. That was the entire amount of sales to everybody, except the District.

Q. You were asked about a subsequent payment by Mr. Wiltsie? A. Yes, sir.

Q. And you stated that it was made on the 8th of May? A. Yes, sir.

215 Q. And you were not asked the amount of that payment? A. No, sir.

Q. Have you any memorandum of it? A. Mr. Wiltsie's entire purchases were $112,724.01. He paid the difference between that and his deposit of $10,000 on the 8th day of May, which would be $102,724.01.

Q. Do you know what clerk wrote this entry on page 272 of your report of tax sales for April, 1899? A. Yes, sir; I think I do.

Q. In whose handwriting is that? A. That is in the handwriting of Mr. C. M. Towers, in our office.

Q. I notice in the upper left hand corner three letters that look like G. W. C.; do you know what these letters are? A. I am under the impression that they were not put on in our office. I do not know what that is.

Q. You do not know? A. No, sir; I do not know. I do not see them on every page. I am not positive whether they were put on in our office or not, but I do not think they were. I do not think they amount to anything in our office, if they were put on there.

Q. Have you any means of stating approximately the actual number of sales made in that sale in April? A. In the neighborhood of 5,000; I really cannot remember whether it was a few over or a few less than 5,000 certificates that were issued.

Q. Does that include the sales in which the District was
216 the purchaser? A. No, sir; there were no certificates issued to the District.

Q. Do you know how many sales there were altogether, including those where the District was the purchaser? A. Our book contained, as nearly as I can remember, about 12,000 pieces of property. Of course a good many of those were paid prior to the sale. I would think that there were 8,000 pieces offered for sale—more or less. There are two other volumes besides this one.

Q. I observe that this volume containing page 272 begins with a page not numbered and then with page 1, and then extends to page 401. I want to ask you if this is the entire document filed with the recorder of deeds under the provisions of law, or whether there are any more? A. There are more.

Q. Do you know about how many more? A. There are two more volumes about the size of this. One of those contains the balance of the city and the other the county.

Q. You are familiar with this report. I would like to ask you if the form in which it is gotten up is similar to the form used in previous and subsequent years?

Mr. DARLINGTON: We object to that as being irrelevant and as being without materiality to any issue in this case.

A. No, sir: it is not exactly the same I think the forms are probably a little different every year. We find changes that we think it is necessary to make.

Q. I observe that one of the characteristics of this docu-
217 ment is that the squares are arranged in consecutive numerical order? A. Yes, sir.

Q. Has that form been formally adopted? A. Ever since I came into the office.

Q. Can you say, from your familiarity with the subject that there is no entry with regard to the sale of sub-lot A in square 432 in either of the other volumes? A. Yes; that this is the only volume that contains anything with reference to that square.

Q. And the ensuing volumes contain squares of higher numbers than the numbers in this volume? A. Yes; they are all in numerical order, and then the county follows:

Re-direct examination.

By Mr. TOBRINER:

Q. In what respect have the forms of the reports been changed from the form of this report? A. I could not state exactly without having the form before me, but I can give you an idea: After we decided to bind these reports—I think this was the first report that was ever bound, because it was the first large sale that we had. Prior to that the sales had not amounted to a great deal. We found there were so many papers we could not keep them accurately without having them bound. In making up this form you will see that each lot takes a pretty large space so that it made a good deal of stuff to bind. In making up these reports after this we ar-
218 ranged it so as to have the lots and squares and descriptions on one or two lines instead of having it take up all this space, so that it would not be so extensive and make so many books to handle and keep. That is the main difference. There may have been some other little difference in the form.

Q. You say this was the first large sale that you had? A. Yes, sir.

Q. What do you mean by this being "the first large sale"? A. I mean that it was the first sale at which we had buyers who bought large amounts of property, and who bought nearly everything that was advertised.

Q. Were the sales large before this? A. No, sir.

Q. Who bought the property that was advertised for sale at previous tax sales? A. The District bought in a good deal of it—the majority of it.

Q. Then the penalties and interest that were assessed on these sales went to the District? A. Yes, sir, they went to the District.

Q. And to the purchasers at these subsequent sales the penalties and interest went to the purchaser?

Mr. JOHNSON: I object to these questions. They are questions of law which I think Mr. Davis is hardly required to advise us about.

A. The interest, after the sale, went to the purchasers and the penalties went to the District, because the purchaser paid the penalties when he bought at tax sale. There was no penalty after the sale except the interest.

219 Q. To whom did they go after this sale and subsequent sales? A. The interest went to the purchaser on the property bought at tax sale.

Q. What do you mean by saying this was the first large sale that you had? Had there not been as much property in default at previous sales as there was at this? A. Yes; but what I mean is large sales to private parties, outside parties, third parties. At all former sales the District purchased the most of it and we hardly called that a sale. Of course there was as much advertised at previous sales as there was at this.

Re cross examination.

By Mr. JOHNSON:

Q. As long as you have been called upon to define your idea of the law, I would like to ask you if it is your understanding of the law that at the sales prior to this the purchaser of the property did not get the interest accruing after the sale, if the property was redeemed? A. Certainly the purchaser got the interest just the same as at this sale.

Q. So that whether the District got it or the purchaser got it depended wholly upon whether the District was the purchaser or an outsider was the purchaser? A. Yes, sir.

ELDRED G. DAVIS.

Subscribed and sworn to before me this 13th day of May A. D. 1904.

JOHN W. HULSE,
Examiner in Chancery.

220 HARRY KING, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. DARLINGTON:

Q. What is your relationship to the complainant, Caroline King? A. Son.

Q. I believe it appears in evidence that your mother carried on business at two places. Where are they? A. No. 810-812-814 7th street; and 715 Market space.

Q. At which of those places are you stationed? A. At the 7th Street store.

Q. How long have you been there? A. For a number of years; about fifteen years.

Q. Were you then associated with the business during your father's lifetime? A. Yes, sir.

Q. What was his name? A. Henry King, Jr.

Q. When did he die? A. August 15th, 1897.

Q. How long have you known the premises in controversy here, No. 715 Market space? A. Since 1888.

Q. Have you known it continuously from that time to this? A. Yes, sir.

221 Q. Who has carried on business there from that time to this? A. There was Mr. Siebel and my father, who were associated together.

Q. How long were they associated? A. For a few years.

Q. And since that time who has been engaged in business there? A. My father has been conducting the place.

Q. Up to what time? A. Up to the time of his death.

Q. When was that? A. August 15th, 1897.

Q. Who was his administrator? A. I was appointed by the court.

Q. What, if anything, did you do with the lease in controversy here, as administrator? A. The lease and stock were sold by order of the court and my mother was the purchaser.

Q. What did she pay for it? A. I think in the neighborhood of $3500.

Q. That is for the stock and lease together? A. Yes, sir.

Q. I understand you to say they were sold together? A. Yes, sir.

Q. In what name has this business been conducted? A. As the "Branch of King's Palace."

Q. How long has it gone under that name? A. Since about 1893.

Q. Prior to that time in what name was it conducted? A. The London Bazaar.

222 Q. It is claimed in the pleadings in this case that the lessor, Mrs. Kennedy was old and forgetful, and forgot that your father was to pay the taxes; and that your father did not comply with the terms of the lease in that particular. What knowledge have you on that subject? A. My father always sent Mrs. Kennedy a check for the amount of the taxes, at her request.

Q. He sent the check to her? A. Yes, sir.

Q. By whom were the taxes paid? A. By Mrs. Kennedy.

Q. You say he sent her these checks at her request? A. Yes, sir.

Mr. PERRY: I want to enter an objection to any statements made by this witness as to any conversations with Mrs. Kennedy or any

statements made by him. While he is not formally a party to the record, I do not know how far the facts may show he is really a party. This objection is made on account of the provision in section — of the Code, which declares such testimony incompetent.

Q. Were those requests verbal or in writing? A. In writing and also verbally.

It is agreed that this objection shall apply wherever applicable although not renewed.

By Mr. DARLINGTON:

Q. What has become of your father's papers, including any letters he may have received from Mrs. Kennedy? A. I have some of them.

223 Q. Have you all of them? A. I have not all of them. Some of them have been lost. We have moved the office on various occasions and the refuse papers cleared out; but we were able to find some of them.

Q. You have been able to find some? A. Yes, sir.

Q. Are you familiar with the handwriting of Mrs. Kennedy? A. I am.

Q. Have you corresponded with her? A. I have.

Q. Please look at what purports to be a letter from her dated May 1st, 1891, addressed to Mr. H. King, Jr., and tell us, if you can, in whose handwriting it is? A. It is in the handwriting of Mrs. Kennedy.

Mr. DARLINGTON: We offer the letter in evidence.

The above mentioned letter is filed herewith, marked Exhibit H K. No. 1 and is in the words and figures following, to wit:

"1630 R. I. AVE., *May 1st*, 1891.

To Mr. H. King, Jr.

DEAR SIR: Please send check for rent of London Bazaar Market space by my servant man Frank Nelson—

Please send my bill, and I will send or call and pay the amount within a few days—

Very respectfully, M. A. B. KENNEDY.

The taxes on the house are due this month—$140.00"

224 By Mr. DARLINGTON:

Q. I also hand you what purports to be a letter from Mrs. Kennedy to your father under date of May 26th, 1891, and ask you in whose handwriting it is. A. It is in the handwriting of Mrs. Kennedy.

Mr. DARLINGTON: I offer this letter in evidence.

The above mentioned letter is filed herewith marked Exhibit H. K. No. 2 and is in the words and figures following, to wit:

"EXHIBIT H. K. No. 2."

1630 R. I. AVENUE, *May 26th*, 1891.

Mr. H. King, Jr.

DEAR SIR: Please send check for $140.00, for tax on store—London Bazaar—

I want to pay all my taxes *to-morrow* as this is the last week in the month—

I should like to have the check this afternoon or very early to-morrow morning—

Very truly yours, M. A. B. KENNEDY."

By Mr. DARLINGTON:

Q. Please look at the memorandum I now hand you, dated May 16th, 1892, and state, if you can, in whose handwriting the written portion of it is and in whose handwriting is the pencil memoranda at the top? A. The handwriting of the written portion is that of Mrs. Kennedy. The handwriting of the pencil portion is mine.

The above mentioned memorandum is filed herewith,
225 marked Exhibit H. K. No. 3, and is in the words and figures following to wit:

"H. K. No. 3.

Mail check (in pencil)

1630 RHODE ISLAND AVE., *May 16th*, 1892.

Mr. King:

Will please send check for $140.00 (one hundred and forty dollars) for tax on London Bazaar—and oblige

M. A. B. KENNEDY."

By Mr. DARLINGTON:

Q. Please look at the letter dated May 1st, 1893 and state whether that is also in the handwriting of Mrs. Kennedy? A. This is also in the handwriting of Mrs. Kennedy.

Mr. DARLINGTON: We offer this letter in evidence.

The above mentioned letter is filed herewith, marked Exhibit H. K. No. 4, and is in the words and figures following, to wit:

"1630 R. I. AVE., *May 1st*, 1893.

Mr. H. King, Jr.

Will please send check for rent of London Bazaar by bearer.

Please let me have the $140.00 for taxes on same by the 10th of the month if possible as I want all my taxes paid not later than the 15th.

Respectfully, M. A. B. KENNEDY."

By Mr. DARLINGTON:

Q. In whose handwriting is the letter dated November 1st,
226 1893, which I now hand you? A. It is in the handwriting of Mrs. Kennedy.

Mr. DARLINGTON: We offer this letter in evidence.

The above mentioned letter is filed herewith marked Exhibit H. K. No. 5 and is in the words and figures following, to wit:

"H. K. No. 5.

1630 R. I. AVE., *Nov.* 1*st*, 1893.

Mr. H. King, Jr.:

Will please send by bearer check for rent of London Bazaar Market space.

I would also call your attention to the $140.00 due this month for taxes on the store. This last I should like to have by the 15th of this month.

Very respectfully, MRS. M. A. B. KENNEDY."

By Mr. DARLINGTON:

Q. In whose handwriting is this receipt of June 1st, 1897, which I now hand you? A. It is in the handwriting of Mrs. Kennedy.

The above mentioned receipt is filed herewith, marked Exhibit H. K. No. 6 and is in the words and figures following, to wit:

"H. K. No. 6.

1630 R. I. AVE., *June* 1*st*, 1897.

Received from H. King, Jr. one hundred and forty three dollars and 42/100 in payment of taxes for store 715 Market space—

M. A. B. KENNEDY."

227 By Mr. DARLINGTON:

Q. What was the first occasion on which your father or you paid taxes on this property to the tax collector? A. To the best of my knowledge the first occasion on which we paid taxes was after my father's death, in December 1897.

Q. Please state what facts and circumstances led to that payment being made to the tax collector instead of to Mrs. Kennedy, as had been the custom theretofore?

Mr. PERRY: Of course this is subject to my objection as to the incompetency of this witness to testify.

A. My brother informed me, about the holidays in December, that Mrs. Kennedy had been in to see him and had asked him to please see that the taxes on the branch store were paid; that she had neglected to inform him in November and to have them mail her a receipt.

Mr. PERRY: I move to strike out what he was informed by his brother, as hearsay.

The WITNESS: I instructed the book-keeper to make out a check and send Mrs. Kennedy the receipt for taxes when he received it.

Q. When he received it from whom? A. When he received it from the tax collector.

Q. Do you know, as a matter of fact, whether that receipt was mailed to her? A. I instructed him to do it and I think he did.

Q. My question is whether you know, of your own personal kn-wledge. A. Of my own personal knowledge I do not know.

228 Q. Did you see it? A. I have not seen the receipt.

Mr. PERRY: I move to strike out what he thinks he did.

Mr. DARLINGTON: I agree to that.

By Mr. DARLINGTON:

Q. Please look at the check which I now hand you, dated December 30th, 1897, and state, if you know, whether that is a check used for the purpose of paying those taxes in December, 1897? A. Yes, sir.

Q. In whose handwriting is the signature of that check? A. In my mother's handwriting.

Mr. DARLINGTON: We offer this check in evidence.

The above mentioned check is filed herewith, marked Exhibit H. K. No. 7, and is in the words and figures following, to wit:

H. K. No. 7.

$139. WASHINGTON, D. C., *Dec.* 30, 1897. No. 387.

Lincoln National Bank of Washington, D. C., cor. 9th & D Sts.,

Pay to the order of E. G. Davis, tax collector $139 34/100 one hundred thirty-nine 34/100 dollars.

CAROLINE KING.

Endorsed: E. G. Davis, collector of taxes D. C. Lincoln nat'l bank, Dec. 31, 1897 Washington, D. C."

In lead pencil:

½ of 98	137.96
1%	1.38
	139.34

229 By Mr. PERRY:

Q. Do you know in whose handwriting are the figures in lead pencil on this check? A. Yes, sir; I know whose figures they are. They are in the handwriting of a former book-keeper, Mr. Alexander.

By Mr. DARLINGTON:

Q. When did you next pay any taxes on this property? A. In July, 1900.

Q. What explanation is there for the fact that you paid no taxes between December, 1897, and July, 1900? A. Mrs. Kennedy had always paid the taxes.

Mr. PERRY: This comes in under my objection, of course?

Mr. DARLINGTON: Yes; that objection runs through.

The WITNESS: Mrs. Kennedy had always paid the taxes herself. She would always notify us when the taxes were due and what amount to send her, and we relied upon her. I did not charge my mind with the matter. My father's sad death in the fall of that year left both my mother and myself both very much mentally distressed and the condition in which the large estate which we supposed our father had was left caused us a lot of anxiety and worry. The creditors were clamoring at all times for their money and we were beset on all sides by people who wanted their money that was due them. Endorsements for large amounts were cropping out and the local banks here were after me every day. My mind was thoroughly unsettled. With the management of the business and because of finding the business in such a condition I had my hands full and all I could possibly attend to.

230 Q. What was the condition of your mother's mind and health during this period? A. My mother's health was very bad and continued bad. From a woman weighing 190 pounds she has gone down to about 145 or 150.

Q. Please look at a letter dated January 1st, 1898 addressed to "Mrs. Caroline King" and tell us in whose handwriting that letter is. A. That is in the handwriting of Mrs. Kennedy.

Mr. DARLINGTON: We offer this letter in evidence.

The above mentioned letter is filed herewith, marked Exhibit H. K. No. 8 and is in the words and figures following, to wit:

Ex. H. K. No. 8.

1630 R. I. AVE., *Jan. 1st*, 1898.

To Mrs. Caroline King.

DEAR MADAM: Accept my thanks for the prompt payment of rent for 715 Market space received this morning.

I was going to write you a "Happy New Year"—but feeling for you in your sorrow I can only wish for you a resigned and contented spirit—feeling that God doeth all things well—

Very truly yours, M. A. B. KENNEDY.

231 Q. Now please explain in what manner you came to take up the payment of taxes on this property in the year 1900? A. I was at that time examining into the matter of taxes on the

estate and was speaking to Mr. Rodgers, who had only been there a very short while. I was instructing him about different things, and it occurred to me to have him go down to the tax office and inquire for the tax bills on 715 Market space.

Q. Please tell us whether or not you were at that time concerned with the question of taxes upon any other property A. Yes, sir, upon various property.

Q. Whose property? A. The property of the estate.

Q. By "the estate" you mean whose estate? A. My father's estate.

Q. Was that also in arrears for taxes? A. Yes, sir; it was always in arrears to some extent.

Q. About how many pieces of property did that estate comprise? A. Nearly forty pieces of improved property and various pieces of unimproved and syndicate property.

Q. Now proceed. A. I had the management of my father's property with Judge Barnard, who was appointed as co-receiver through the action of the creditors. Receivers were appointed for my father's property and Judge Barnard and myself were appointed as receivers; but I had the actual management of the property in its entirety.

Q. What followed after you gave Mr. Rodgers the instruc-
232 tions of which you speak? A. Mr. Rodgers brought me back the information that the taxes were due on that property, and I told him to make out a check for the sum, which he did, and I signed the check.

Q. Please look at the check marked Exhibit Rodgers No. 1 and state whether that is the check in question. A. Yes, sir; that is the check in question.

Q. Is any part of that check, besides the signature, in your handwriting? A. The part which says "Taxes on 715 Market space for M. A. B. Kennedy."

Q. You wrote that? A. Yes, sir; I wrote that.

Q. What next occurred in this matter of the payment of taxes on that property? A. Mr. Rodgers went to pay the taxes on 715 Market space. I signed the check, and in about half an hour's time he came back and said to me——

Mr. PERRY: I object to that as hearsay evidence.

A. He came back and told me that there was a back tax on that property. I said: "Why, I can't see how that is." "Well" he said "that is what they gave me from the tax book." I said "Did you look into the matter carefully down there?" He said "Yes, sir, very carefully." I said "All right, Mr. Rodgers, make out another check and go down and pay those taxes, and ask if there is anything else due on that property." I didn't know there were any back taxes due, and I wanted the matter cleared up.

Q. What followed? A. Mr. Rodgers took the check down
233 and paid them and came back and reported to me that they

had told him at the tax office that there was nothing else due on the property.

Mr. PERRY: I move to strike that out as incompetent and hearsay.

By Mr. DARLINGTON:

Q. Please look at Exhibits Rodgers No. 3 and No. 8, both dated May 24th, 1901, the checks being numbered 7,923 and 7,925, and state whether those are the two checks of which you have last spoken. A. Those are the two checks. This check No. 7,923 was the check I signed first. The check No. 7,925 was the check I signed when Mr. Rodgers returned from the tax office.

Q. When and how did you first learn anything further about arrears of taxes on this property? A. When I received Mr. Wiltsie's letter in July.

Q. That letter has already been offered in evidence as Exhibit Rodgers No. 9. What did you do on receipt of that letter? A. I consulted my attorney Mr. Tobriner.

Q. Was that the first thing you did? A. The first thing I did was to answer his letter and then I brought the letter down to Mr. Tobriner.

Q. What examination of your books, if any, did you cause to be made at that time? A. I caused a thorough examination of the books to be made at that time.

Q. For what purpose? A. To find out if the tax had been paid, as that was the first intimation we had that the tax was unpaid.

234 Q. Did you at any time, know Maria T. Gillis? A. I did not, sir.

Q. When did you first hear her name? A. When I received a letter from Mr. Wiltsie; and I did not know then who Maria T. Gillis was.

Q. Mr. Rodgers has testified that in 1900 he told you that this property was assessed in the name of Maria T. Gillis. A. I do not remember that he did. If he did it made no impression on me at the time. I am a very busy man.

Q. Is the copy filed as Exhibit No. 2 with the answer of Mr. Cohen in this case, your letter to Mr. Wiltsie to which you are now referring? A. Yes, that is the letter I wrote to Mr. Wiltsie.

Mr. DARLINGTON: We offer this letter in evidence.

It is agreed that said letter may be copied into the printed record in this cause, in lieu of the production of the original:

Said letter is in the words and figures following, to wit:

"Filed April 18, 1902.

WASHINGTON, D. C., *July* 30, 1901.

Mr. Charles H. Wiltsie, Rochester, N. Y.

DEAR SIR: We are in receipt of your communication in reference to sublot A, square 432, assessed in the name of Maria T. Gillis, and in reply will say that we are willing to pay a reasonable amount for the redemption of same.

Please advise us and oblige

H. KING, JR.

Copy."

235 Q. Please look at the paper I now show you and state whether that is the reply from Mr. Wiltsie's office to your letter of July 30th? A. This is the reply to that letter.

Mr. DARLINGTON: We offer this letter in evidence.

The above mentioned letter is filed herewith, marked Exhibit H. K. No. 9 and is in the words and figures following, to wit:

EXHIBIT E. H. No. 9.

Charles H. Wiltsie, attorney and counselor, 820 Powers bldg., Rochester, N. Y.

#909–Wash.–99.

AUGUST 1, 1901.

H. King, Jr., 810 7th street N. W., Washington, D. C.

DEAR SIR: Your letter of July 30, with reference to tax certificate against sublot A, square 432, in the name of Maria T. Gillis, has been duly received. I will assign or surrender this certificate upon the following computation:

Face of certificate	$143.83
Recorder's fee	.10
Aggregate	143.93
Interest two years, four months at 15 %	50.38
Charge for releasing	100.00
Total	294.31

236 Please send New York draft or postal money order, and I will send the tax certificate directly to you; or, if you prefer, notify me as soon as you are ready to make payment and the certificate will be sent to the Central National Bank of Washington,

which is my fiscal agent, where the papers will be open to examination and payment can be made. The papers will be duly released and also assigned in blank so that any name can be inserted.

Respectfully yours, E. R. KLEIN, *Clerk.*

G.

In correspondence please refer to serial # 909 Wash. 99.
Send only N. Y. exchange or postal money order. Local checks subject to collection charges."

By Mr. DARLINGTON:

Q. Do you know anything of a letter dated August 10th, 1901, signed H. King, Jr., R. W., which appears to be in reply to the letter last produced in evidence? A. No, sir; I do not know anything about that letter.

Q. Were you absent at that time? A. I was absent from the city.

Q. Who was R. W.? A. I think there must be a mistake in the initials there. I cannot recall who R. W. would be.

Q. Who was there in your place of business at that time who would write such a letter as this? A. I think it was Mr. J. Hollinger.

Mr. DARLINGTON: We offer this letter in evidence.

237 By agreement the letter above referred to, dated August 10th, 1901, signed H. King, Jr. R. W. is to be copied from the printed record in this cause, in lieu of the production of the original.

The above mentioned letter is in the words and figures following to wit:

909–Wash.–99.

WASHINGTON, D. C., *Aug.* 10, 1901.

Chas. H. Wiltsie, Rochester, N. Y.

DEAR SIR: In reply to yours of 1st inst. # 909 Wash. 99, we beg to say that our Mr. Harry King is out of town at present. On his return next Monday, we will lay your letter before him for reply.

Truly,
H. KING, JR.
R. W.

Copy."

By Mr. DARLINGTON:

Q. The next letter in the chain of correspondence seems to be a letter from Mr. Wiltsie's office under dated of September 17th, 1901, signed E. R. Klein, clerk. Do you recall having seen such a letter as that? A. Yes, sir; I was at home when that letter was received.

Mr. DARLINGTON: We offer this letter in evidence.

It is agreed by and between counsel that the above mentioned

letter may be copied from page 53 of the printed record in this cause, in lieu of the production of the original.

Said letter is in the words and figures following, to wit:

"909–Wash.–99.

238 SEPTEMBER 17, 1901.

H. King, Jr., 810 7th St. N. W.. Washington, D. C.

DEAR SIR: I write to call your attention to the delinquent tax sale certificate which I hold against sublot A, square 432 in the name of Maria T. Gillis, and to ask when same is to be taken care of. In your letter of August 10th, you stated that Mr. Harry King would give this matter attention upon his return the following week. I have heard nothing further with reference to the matter and I shall esteem it a favor if you will write me by return mail stating when this matter is to have attention. I am desirous that the certificate should be taken up at an early date.

Very respectfully yours, E. R. KLEIN, *Clerk.*

N.

In correspondence please refer to serial # 909–Wash.–99."

Q. Please look at what purports to be your reply dated September 21st, 1901, and state if you can identify that as the letter which you wrote in reply? A. Yes, sir; that is my letter.

Q. Where had you been? A. I had been in the country for part of the time and had been up in the New York market buying goods, getting ready for the fall opening.

Q. Do you know when you returned to the city? A. Some where about the middle of September, I suppose. I cannot exactly fix the date; but it was the first part or the middle of September.

239 Q. Please look at this paper, purporting to be a letter from E. J. Watson, managing clerk for Charles A. Wiltsie, dated September 24th, 1901, and state whether you received that letter? A. Yes, sir; I received that letter.

Mr. DARLINGTON: We offer this letter in evidence.

It is agreed by and between counsel that the letter above mentioned may be copied in the printed record in this cause at page 53, in lieu of the production of the original.

Said letter is in the words and figures following, to wit:

"909–Wash.–99.

SEPT. 24, 1901.

Harry King, 812 7th St. N. W., Washington, D. C.

DEAR SIR: Your letter of September 21st addressed to Mr. Wiltsie with reference to the redemption of the delinquent tax sale certificate which he holds against sublot A, square 432 assessed in the

name of Maria T. Gillis, has been duly received. You state that you think the charge for the release of this certificate is too much. Mr. Wiltsie is absent from his office and I have no authority to make any concessions on such certificates, but if you will take up this matter promptly I will assume the responsibility of accepting $75 for the release of this certificate. There is now two years six months' interest due and I make a computation on this basis as follows:

	Face of certificate	$143.83
	Recorder's fee	.10
	Aggregate	$143.93
240	Interest two years six months at 15%	53.97
	Charge for releasing	75.00
	Total	$272.90

Believing that you will accept this offer, I have to-day sent these papers to the Central National Bank of Washington, with receipt on you for $272.90, where they will be open to your examination and payment can be made. Please call at the bank upon receipt of this letter and take up the papers promptly.

Very respectfully yours, E. J. WATSON,
Man'g Clerk.

Dic. (E. J. W./N.)

Q. Do you recall whether you replied to the letter of September 24th? A. I cannot say that I did.

Q. What is the next thing that occurred with regard to this Wiltsie tax purchase? A. I received a letter from Mrs. Kennedy informing me that the lease had been forfeited.

By Mr. PERRY:

Q. Where is that letter?

Mr. DARLINGTON: It is in the record somewhere.

Q. Is Exhibit C, filed with the bill in this cause, a copy of that letter? A. That is a copy of the letter I received from Mrs. Kennedy.

Q. Prior to that time, what had been the relations between
241 your mother and Mrs. Kennedy? A. Very friendly.

Q. It is claimed in some of the answers that theren't was in default at the time you as administrator, sold the lease to your mother. Is that accurate or inaccurate? A. That statement is not correct.

Q. Your father died on the 17th of August? A. On the 15th of August, 1897.

Q. Was the rent at that time paid up for the month of August? A. The rent was paid up for the month of August.

Q. When was the lease assigned to your mother? A. The latter part of August.

Q. Before the expiration of the month which had been paid for? A. Yes, sir.

Mr. DARLINGTON: I offer this letter in evidence.

It is agreed by and between counsel that the above mentioned letter may be copied from the printed record in this cause, pages 19 and 20, in lieu of the production of the original.

The above mentioned letter is in the words and figures following, to wit:

1630 R. I. AVE., *Oct. 1st*, 1901.

To Mrs. H. King, JR.:

I have only learned within the last few days, that you have forfeited your lease of premises 715 Market space by neglecting to pay the taxes and allowing the property to be twice sold at tax sales.

The lease being thus vitiated and by advice of my attorney I must decline receiving any further rental from you.

242 For fuller explanation of my action in the matter, I refer you to Mr. H. Randall Webb.

M. A. B. KENNEDY."

Q. Please look at the postal card from Eagles Mere, Pa. dated August 3rd, the postmark showing that it was in the year 1901, and state in whose handwriting it is. A. It is in Mrs. Kennedy's handwriting.

Mr. DARLINGTON: I offer this postal card in evidence.

The above mentioned postal card is filed herewith, marked Exhibit H. K. No. 10, and is in the words and figures following, to wit:

" Ex. H. K. No. 10.

EAGLES MERE, PA., *Aug.* 3.

To Mr. H. King, Jr.:

Thank you very much for your promptness in sending check for rent of 715 Market space. I am improving daily in this mountain air, but am not yet quite well.

Very truly yours, M. A. B. KENNEDY."

Postmarked: Eagles Mere, Aug. 3 8 p. m. 1901 Pa. Washington, Aug. 4, 3-30 p. 1901 D. C. Station G received.

Q. From the time of your earliest knowledge in regard to the lease of this store by your father, down to the time of this forfeiture letter of October 1st, 1901, what controversy, difficulty or breach of friendly relations of any kind occurred between Mrs. Kennedy and your father or your mother that you know of?

Mr. PERRY: This is objected to as irrelevant.

A. None at all; in fact, our relations had been very friendly.

243 Q. When you first knew the store property, what portion of it was used for store purposes? A. The first and second floors.

Q. How long had those two portions of the store continued to be used for that purpose? A. Up to the present time.

Q. How were they connected? A. By a stairway from the first floor to the second floor. The stairway ran from the center of the store right up—a spiral stairway.

Q. It is claimed that your mother tore away and abolished the entrance to this property. What is the fact about that? A. We improved the front part of the store by taking away the side entrance, which was done with Mrs. Kennedy's consent and approval.

Q. How do you know that? A. I went to see her, personally, and explained to her what we desired to do. That was in the spring of 1898. We were about talking over our plans for rebuilding and remodelling the front and I explained to Mrs. Kennedy what the improvement would be and said that I thought it would enhance the value of her property to quite an extent. I went over it in detail with her and told her exactly what we were going to do. She approved of it and told us to go ahead.

Mr. PERRY: I move that this be strickn out, for the reason already given.

By Mr. DARLINGTON:

Q. Upon the receipt of this letter of October 1st, what did
244 you do? A. I went to see my attorney and consulted with him about it.

Q. You may leave that out and tell what you did. A. The next morning I went to the Lincoln national bank and had a certified check drawn up for the amount of the taxes with the penalty and bonus and interest. I think the check was made payable to my own order. I had the check certified. I went over to the Central national bank.

Q. Just one moment—is this the check to which you refer (exhibiting a check to the witness)? A. That is the check, sir.

Mr. DARLINGTON: We offer this check in evidence.

The above mentioned check is filed herewith, marked Exhibit H. K. No. 11 and the same is in the words and figures following, to wit:

EXHIBIT H. K. No. 11.

No. 9005. WASHINGTON, D. C., *Oct.* 2*d*, 1901.

Lincoln National Bank of Washington, D. C., cor. 7th and D Sts.

Pay to the order of Harry King $272.90 two hundred & seventy two 90/100 dollars

$272. CAROLINE KING & SONS.

Good for $272.90 when properly endorsed

$272.90 ALBERT S. TALBERT,
Paying Teller.

Endorsed: Harry King for deposit account of Caroline King & Sons."

245 The WITNESS: I went over to the Central national bank before banking hours. I went in to the side door and went around to see the teller, Mr. Price. I told him that I wanted to pay a tax certificate that Mr. Wiltsie had sent there in the name of Maria T. Gillis. He informed me that the tax certificate had been recalled by telephone message from Rochester and a dispatch from the same place that afternoon, after banking hours.

Q. On which afternoon? A. The afternoon of the day before I was there. I do not remember whether he said that the telephone and dispatch had been received after banking hours or that one of them had been; but he said they had mailed that tax certificate.

Q. Do you know Mr. Turpin, at the Central national bank. A. I did not see Mr. Turpin. I saw Mr. Clarence Price, the teller.

Q. What did you do then? A. Then I went up and saw Mr. Webb, and I had a conversation with that gentleman.

Q. Why did you go to see Mr. Webb? A. Because Mrs. Kennedy, in her letter, had referred me to Mr. Webb. I said: "Mr. Webb, what does this mean?" Mr. Webb rolled back in his chair very easily and said "Why, it means that you have forfeited your lease down there by not paying your tax down there in 1897.

Mr. PERRY: This was in October, 1901.

Mr. DARLINGTON: October 2nd, 1901.

246 The WITNESS: I said "Mr. Webb, what does this mean?" Mr. Webb informed me that the lease had been forfeited for the nonpayment of taxes in 1897 and told me that he was very glad of it; that he was delighted and pleased to hear it; that the place was worth more money and ought to bring more money; that a tax operator by the name of Knight had informed him of it. After I had asked him about the tax he informed me that Mr. Knight had told him about it some week or two weeks previously; I cannot exactly fix

the time. I then said "Mr. Webb, this is not fair treatment. The relations between Mrs. Kennedy and my mother have always been very friendly and in fact the relations with all of us have been friendly; and this is no way to treat us. I said "We had that lease down on the Avenue when it was not worth the rent it is now and because trade conditions have changed and made that lease more valuable is no reason why we should be squeezed. I also told him in that conversation that I wanted him to understand that we would not waive any of our rights with reference to the lease. Mr. Webb said that Mrs. Kennedy would make a new lease with us for an increased rental but would not make it for a long term of years. I asked him what he meant by an increased rental and whether he proposed to take that property to every merchant and hawk it around and put it up to the highest bidder. He told me that he was going to get all the money out of it he could. I then said: "Mr. Webb, we are not being treated right. It is not fair. We are paying a good rent for that store. 717, on the right hand side, Mr. Kann rents, and they only pay $150 a month for the store, to my
247 knowledge. That was a longer store than mine. He then asked me what they paid for the Johnson Luttrell store, which is No. 713 Market space. I told him I did not know exactly, but I thought they paid in the neighborhood of $3,000 a year rent. That was from what I had heard on the street. The store was much wider than ours and much longer, and it had an ell to it. It was a much finer building. When I asked Mr. Webb again what he meant by making a new lease to us he said "Well, I will see Mrs. Kennedy and we will talk the matter over and I will let you know what arrangements and what kind of a lease we will make with you. I again told him there would be no waiving of our rights in the matter of a lease and that we did not propose to consider it a forfeiture; that we had not wilfully, at any time, neglected to pay any taxes on the property. I then said "Mr. Webb, have you any objection to my going to see Mrs. Kennedy?" He said "I prefer that you should not go to see her. You can transact all your business with me." I went to the door and as I went out I said "Mr. Webb, I am going to see Mrs. Kennedy." I went up to see Mrs. Kennedy and she denied herself to me on the plea of not being well. Then I came down to see Mr. Tobriner and I told Mr. Tobriner——

Q. What you told him would not be evidence. A. I went to see Mr. Tobriner and laid the matter before him and I then went to the telegraph office and telegraphed to Mr. Wiltsie.

Q. Did you retain a copy of the telegram you sent Mr. Wiltsie? A. Yes, sir.

248 Q. Please look at this paper and state whether that is the copy? A. That is the copy of the telegram I sent.

Mr. DARLINGTON: We offer this copy in evidence.

Mr. PERRY: So far as I am concerned, I do not require you to produce the original, but I object to it as irrelevant.

Mr. JOHNSON: I object to it as being irrelevant and immaterial. No communication between the witness and Mr. Wiltsie can affect the rights of the defendants Kann and Cohen.

The above mentioned telegram is marked Exhibit H. K. No. 12, and the same is in the words and figures following, to wit:

Ex. H. K. No. 12.

OCT. 2, '901.
OCT. 2/1901.

Charles H. Wiltsie, 820 Powers bldg., Rochester, N. Y.:

Called at bank find certificate recalled have mailed certified check send me certificate answer my expense

HARRY KING."

The WITNESS: I then went to the store and immediately had a letter written and mailed a certified check to Mr. Wiltsie at Rochester.

Q. What reply, if any, did you get to your telegram and letter? A. I received a reply by telegraph, which I produce.

249 Mr. PERRY: I object to it for the same reason as already given.

Mr. DARLINGTON: I offer the copy in evidence.

The above mentioned telegram is filed herewith, marked Exhibit H. K. No. 13, and is in the words and figures following to wit:

"EXHIBIT H. K. No. 13.

Number 36 W. Sent by M. Rec'd by W. 9 coll. Check 2 x
Dated Rochester, N. Y. Rec'd at 3:30 p. m.

OCT. 2, 1901.

To Harry King, 812 7th St. N. W.:

Certificate redeemed check will be returned.

E. J. WATSON,
Mg. Clerk."

Q. Have you Mr. Wiltsie's reply to your letter? A. Yes, sir; this is his reply to the letter.

Mr. DARLINGTON: We offer this letter in evidence.

Mr. PERRY: I object to the letter for the reasons already given, that it is immaterial and irrelevant.

The above mentioned letter is marked Exhibit H. K. No. 14 and the same is in the words and figures following, to wit.

Charles H. Wiltsie, attorney and counsellor, 820 Powers bldg., Rochester, N. Y.

OCTOBER 3RD, 1901.

DEAR SIR: Your letter of October 2nd, enclosing certified check payable to Mr. Wiltsie's order for $272.90 has been duly re-
250 ceived. Your telegram was received yesterday and I also telegraphed you in reply stating that this certificate had been redeemed and that I would return your check. I herewith return this check as we do not hold the certificate any longer.

Respectfully yours, E. J. WATSON,
Man'g Clerk.

Dic. E. J. W.—C."

Q. What did you then do? A. I then sent Mr. Wiltsie another dispatch.

Q. Have you a copy of that? A. I have, sir, and I here produce it.

Mr. DARLINGTON: We offer this copy in evidence.

Mr. PERRY: I object to it for the same reason.

Mr. JOHNSON: I object to it as immaterial and irrelevant.

The above mentioned telegram is filed herewith, marked Exhibit H. K. No. 15, and the same is in the words and figures following, to wit:

OCT. 3, 1901.

To Charles H. Wiltsie, 820 Powers bldg., Rochester, N. Y.:

Wire at my expense name of party who has redeemed Maria T. Gillis certificate.

HARRY KING."

Q. Is there anything else you did about this matter, beyond employing an attorney? A. Yes, sir.

251 Q. What was it? A. A day or so afterwards, after I had found out through my attorney who had purchased this tax certificate——.

Q. Did you get any answer to this telegram to Mr. Wiltsie, inquiring the name of the party who had redeemed the certificate? A. No, sir; I did not. He did not inform me who was the purchaser. A day or two afterwards—I cannot remember exactly whether it was the next day or two days afterwards, I learned through my attorney that Mr. Cohen was the purchaser of the tax certificate. My attorney told me that it had been recorded and was matter of record. I then went down to see Mr. Sigmund Kann.

Q. Who is he? A. He is a member of the firm of S. Kann Sons.

Q. Why did you go to him? A. I went to him because I thought that if Mr. Cohen had purchased the certificate he had something to do with it, because I knew that Mr. Cohen was not purchasing a certificate of that kind on his own account.

Q. What did you know, if anything, about the relation between

Kann & Sons and Mr. Cohen? A. I knew that they had been very friendly and that Mr. Cohen had transacted most of Mr. Kann's business.

Q. Tell us what took place. A. I went to see Mr. Kann, in the first place, because Mr. Kann was related to us by marriage. He had married my mother's sister's child, my first cousin, and we had always been very friendly. In fact, a short while before this, he had informed me that anything he could possibly do for me he
252 would be very glad to do, that he would extend me any favor or any accommodation and would gladly let me have anything in his power at any time. I went to Mr. Kann and I said "Sig. what does this mean?" He said "What does what mean?" I said "What does this mean, this purchase of this tax certificate for this property we have next door?" He said "Why, I don't know anything at all about it. I said "Now come come Sig. don't tell me that; you know better than that. You do know something about it. I said "Do you remember the promise you made to me some time ago? I want you to fulfill that promise and I want you to see Mayer Cohen and get that certificate back and deliver it to me. He said "I have no control over Mayer Cohen's actions." I said "Yes, you have in a matter of this kind and I want you to do it." He said "I am going to see Mayer Cohen at dinner and I will talk the matter over with him and let you know. I went back to see Mr. Kann the next day and he told me he couldn't do anything at all in the matter. Then I went to Mr. Tobriner and told him.

Q. What took place between you and Mr. Tobriner would not be evidence. It seems to be claimed in the pleadings here that you were at fault in allowing a matter of $25 or $50 bonus to Mr. Wilstie stand in the way of a redemption of this property for some time. What do you say to that? A. I considered the demand that Mr. Wiltsie made upon me an imposition, and as a matter of principle I thought that he was trying to take advantage of me by charging me a bonus with the interest added—three times the amount of the tax. I knew that Mr. Wiltsie was not in the habit of securing tax
253 deeds, and I did not consider the property in any danger because Mr. Wiltsie is a tax speculator pure and simple.

Mr. PERRY: This is objected to as absolutely irrelevant and incompetent, and I move to strike it out.

Mr. DARLINGTON: We submit that it is entirely competent and proper, in view of the criticism in the pleadings as to the conduct of Mr. King and Mrs. King, and this testimony is explanatory thereof.

The WITNESS: He purchases these tax certificates for the enormously large interest which they bring him.

Q. In what instance, if any, have you ever known of his getting a tax deed? A. I have not known of any instance where he has received a tax deed; but I have paid Mr. Wiltsie interest on tax

certificates that he has purchased on property belonging to the estate.

Q. Prior or subsequent to your correspondence with him in regard to this matter? A. Prior to it.

Q. At the time of your communication with him on this subject, what legal advice had you as to the validity or invalidity of this tax sale? A. I was told by my attorney that the tax sale was invalid.

Q. One further explanatory matter. It is claimed in one of the answers that in an equity suit of The Ohio National Bank vs. Caroline King, No. 19,338, on the equity docket of this court, you stated that this lease was in default for rent and liable to be forfeited.
254 Is that correct? A. That had no reference to 715 Market space. That had reference to the store on 7th street. The rent for them had been unpaid.

Cross-examination.

By Mr. PERRY:

Q. Mr. King, to what extent did you participate in the management of the business, during your father's lifetime? A. I was my father's general manager.

Q. For some years prior to his death, you really managed and conducted the business; did you not? A. Yes, sir; I managed and conducted the business.

Q. Have you produced here all of the letters that Mrs. Kennedy wrote either to you or to your father or mother? A. Yes, sir; we have produced all that we can find. We have made a very diligent search of the papers. We have a great number of papers that accumulate in a business like ours and we have moved our office on various occasions. At one time we had to clear away a lot of papers on account of the request of the insurance inspector. Of course in moving and in going through such a mass of papers, some of them must have been lost. We have produced all of them that we could possibly find.

Mr. DARLINGTON: I will state that I have not offered in evidence all the letters which Mr. King has produced. There are others here which counsel may see.

Mr. PERRY: I would like to see them now.

(The letters were handed to counsel for the defendant.)

By Mr. PERRY:

255 Q. Perhaps, with the aid of your counsel, you can say whether or not you have any letter between the date of the postal card of August 3rd, 1901, and the time of your father's death, which was August 15th, 1897, referring in any way to these taxes? A. No, sir.

Q. You have no such letter? A. We have no such letter.

Q. Mrs. Kennedy appears to have been quite regular in writing about these taxes prior to your father's death? A. Yes, sir.

Q. And you have no letter referring to taxes at all? A. Not at all, sir.

Q. You have none at all referring to taxes from the time of his death? A. No, sir; not a letter.

Q. Did you receive any such letters? A. No, sir; we did not.

Q. You are positive about that? A. Positive, sir.

Q. How soon after your father's death was it that his estate became involved in litigation? A. In actual litigation?

Q. Yes. A. I should suppose that it was a year afterwards that it was involved in actual litigation; but our creditors had been pressing for their money ever since my father's death.

256 Q. From the time of your father's death you were very much involved? A. Yes, sir.

Q. Were you able to meet your commercial obligations as they became due? A. My mother had life insurance, quite a lot of it.

Q. The question is whether you were able to meet your commercial obligations when they became due? A. Yes, sir.

Q. You paid every commercial bill due? A. Yes, sir.

Q. And as they became due? A. Yes, sir.

Q. Then why was there any litigation? A. The business was sold to my mother and it was separate and apart from the estate. The business did not involve the estate and the estate did not involve the business.

Q. I do not know that I quite understand that? A. The estate had no bearing upon the business.

Q. When you say "the estate" what do you mean? A. I mean my father's estate of which I was the administrator.

Q. It was a part of the business on 7th street and on Market space when your father died? A. Yes, sir.

Q. So that when you say your father's estate you mean these two businesses? A. No; these two businesses were sold by the order of the court.

257 Q. But you mean these two businesses were the two things that were sold, were they not? A. Yes, sir; the two businesses were sold.

Q. How soon after your father's death were they sold? A. At the end of August.

Q. He died August 15th? A. Yes, sir.

Q. And the businesses were sold by the end of that month? A. Yes, sir.

Q. Who bought them? A. My mother.

Q. She bought what? A. She bought the stock and leases. She did not buy, of course, the debts of the business.

Q. Then she did not become liable for the debts? A. No, sir.

Q. Your father's estate remained liable for those debts? A. Yes, sir.

Q. Did your mother carry on the business from that time on? A. Yes, sir.

Q. Were you at all embarrassed in the conduct of that business? A. No, sir.

Q. How did your mother pay for that business? A. With borrowed money.

Q. Did you have to pay interest on that money? A. Yes, sir.

258 Q. Did you make enough from that business to pay your current liabilities as they accrued? A. Yes, sir; the busy season was just approaching at that time, and we succeeded.

Q. Did you, in connection with your father's estate, have to take money from the business at any time, to pay debts of the estate? A. Did we have to take money from the business?

Q. Yes. A. For the first year that I was administrator my mother, of course, had the rent of the houses, before the litigation began. The rents of the houses were hers.

Q. I do not think that quite answers my question. I want to know whether, during the first year that your mother was conducting this business on 7th street and on Market space, she drew upon the business in any way or whether you drew on it in order to pay the debts of the estate? A. To meet the debts of the estate?

Q. Yes. A. We allowed a good many debts of the estate to go by. Some of the interest was not paid promptly and the taxes were not paid promptly.

Q. That was on your father's property? A. Yes.

Q. I am not asking you about that now. I am asking you what drains there were upon the income of the business carried on by your mother at these two places, during the first year you carried it on, from September 1897 to September, 1898? A. We

259 paid promptly all the debts of the business. My mother had insurance money. That came in and we had borrowed some money from a relative.

Q. You were not strained at all, so far as this business was concerned, in meeting your liabilities and also meeting your living expenses? A. No, sir.

Q. Who were dependent on the earnings of this business during that year from September 1897 to September 1898? A. My mother.

Q. How large a family was dependent on it? A. Three or four families—three families.

Q. They were dependent on what you earned? A. Yes, sir.

Q. How large were those families? A. They were fairly large families.

Q. What was the result, at the end of that first year, with respect to earnings during the year? A. Our business was fairly successful.

Q. That was not the question. Did you earn anything during that first year? A. Yes, sir.

Q. How much? A. That I could not say.

Q. Do you mean you are unable to say or that you will not say?

A. I am unable to say and I don't know that I ought to give the results of our business here.

Q. You say you were the administrator? A. Yes, sir.

260 Q. Your father left no will? A. Yes, sir, he did.

Q. Then you were his executor? A. No, sir; I was administrator with the will annexed. My mother was unable to attend to it.

Q. Then it was you, who, under the order of the court, sold this lease to your mother? A. The lease and stock; yes, sir.

Q. You knew what was in the lease, I suppose? A. No, sir; I did not.

Q. Did your mother know what was in the lease? A. No, sir.

Q. You sold and she bought without knowing what the lease was? A. Yes.

Q. Did you, in point of fact, know or did your mother know, to your knowledge, that according to the lease the lessee was bound to pay the taxes? A. We knew it from the fact that we had paid the taxes before.

Q. You knew when taxes accrued in May and November of each year as a rule, although there had been exceptions, did you not? A. Yes, sir.

Q. When November of 1897 came around you did not receive any notification from Mr. Kennedy about taxes? A. No, sir.

Q. But you say you learned in December of that same year, shortly before Christmas, that she had neglected to give you

261 notice? A. Yes, sir; but she did not give that message to me. She gave it to my brother and my brother, in turn, gave it to me.

Q. Did you inform your mother of it? A. Yes, sir.

Q. And thereupon the tax was paid? A. I don't know whether I informed my mother or not. I cannot recall that I did, because I did not tax my mother with business concerns. I attended to it myself. It is most likely I did not tell her.

Q. At any rate you knew it? A. Yes, sir.

Q. You were manager of her business also, were you? A. Yes, sir.

Q. In point of fact you conducted her business for her, did you not? A. Yes, sir.

Q. As you had done for your father during the last years of his life? A. Yes, sir.

Q. Your mother did not take any active part in the financiering and management of it at all; did she? A. No, sir.

Q. So that really you were the manager? A. Yes, sir.

Q. And you had it pointedly brought to your attention in December of 1897 that taxes had been due the preceding November that you were bound to pay and which had not been paid? A. Yes, sir.

262 Q. When May came around, what did you do? A. I did not do anything. I had not charged my mind with it at all.

Q. You knew you were to keep these taxes paid? A. Yes, sir.

Q. You knew the taxes were levied annually against the premises? A. Yes, sir.

Q. You knew they were payable twice a year? A. Yes, sir.

Q. When November, 1898, came around what did you do about these taxes? A. I did not do anything for the same reason I stated before.

Q. When May, 1899 came around, what did you do about these taxes? A. Nothing, for the same reason.

Q. When November, 1899, came around what did you do about these taxes? A. Nothing.

Q. When May, 1900, came around what did you do about these taxes? A. Nothing at all.

Q. Now, Mr. King, I ask you again, for the sake of having no possible mistake about it, if you are certain that you received no letter from Mrs. Kennedy with respect to these taxes down to May,

263 1900? A. Yes, sir, sure.

Q. You are certain of that? A. Positive.

Q. And no verbal demand of any sort? A. No, sir.

Q. In July, 1900, what started you up about them? A. Well, as I said, I was examining into some tax matters with reference to the estate and it occurred to me to go down and get the taxes on 715 Market space. The moment it occurred to me I immediately sent Mr. Rodgers down there.

Q. During these years, from your father's death, what default had you made in regard to the payment of taxes on your father's estate. You have referred to that matter yourself? A. Yes, unfortunately.

Q. And you say that not being able to meet these debts at that time that the taxes were not paid promptly? A. On many occations.

Q. Did you have to negotiate with this Mr. Wiltsie? A. I cannot answer as to the number of times.

Q. In a letter of yours in evidence here, under date of September 21st, 1901, you say: "I hardly think it is your desire to squeeze us or be unreasonable. Unfortunately we have paid you quite a considerable amount of money in the past for tax sales. A. Yes, sir.

Q. What did you refer to? A. I referred to taxes that had become due on the estate.

264 Q. As a matter of fact you did not pay any of these taxes, did you? A. Yes, we did.

Q. A very large number of them you had to—— A. Not such a very large number; but quite a few. It was a very large estate.

Q. You knew then that under the law of the District, if taxes were not paid and the property was sold for taxes that you had to redeem within two years, did you not? A. I cannot say I knew it at that time.

Q. When did you learn it? A. I have learned it since this suit has been instituted, since these proceedings were begun.

Q. A ledger has been introduced here covering these years and it

appears from that ledger that the payment which was made in December 1897 was entered on the ledger. A. That is correct, sir.

Q. There is no further credit in there, as I recollect until we come to this payment in July, 1900. That is correct, is it not? A. That is correct.

Q. That ledger was your ledger? A. Yes, sir.

Q. Open to your inspection at any time? A. It was at any time I wanted to inspect it; but, Mr. Perry, I inspect my books very rarely. I have not the time for that. I have a bookkeeper to attend to that.

Q. You spoke of the mental distress which your father's death caused you? A. Yes, sir.

265 Q. And which of course I do not wish to refer to further than is necessary. That did not hinder you from carrying on this business as you say successfully? A. We had to.

Q. At these two places? A. We had to; we had a lot of mouths to feed.

Q. And it was a difficult matter to do it, was it not? A. It was.

Q. You also referred to the great confusion that your father's matters were left in. A. Yes, sir.

Q. There was no confusion about the new business; you managed that without confusion? A. Yes, sir; the business ran all right.

Q. You had presence of mind and command of your faculties enough to manage that new business, efficiently and to feed these many mouths? A. I had very competent help to do that with, Mr. Perry.

Q. You say you first learned anything about this tax sale from Mr. Wiltsie's letter of July 30th, 1901, which is in evidence here? A. Yes, sir.

Q. You first learned of it from that? A. Yes, sir.

Q. You went immediately to consult Mr. Tobriner? A. I laid the matter before him.

Q. I cannot ask you anything about what occurred between Mr. Tobriner and yourself.

Mr. DARLINGTON: We waive any question of privilege and are willing that that matter may be fully gone into.

266 Q. Then if we should consider it essential to do so we will do it hereafter, but not now.

Is it not a fact that just after you had seen Mr. Tobriner you went up to see Mr. Webb? A. No, sir; I did not at that time.

Q. I find that I was misinformed on certain matters on which I based that question. What I want to ask is this. When, in May, 1901, you paid the back taxes for the second half of the year 1898 as to part of the property and also redeemed the part of lot A in square 432 which had been sold for taxes in April, 1900 and also paid all the taxes for the year ending June 30th, 1899, you knew of course that there were these back taxes; did you not? A. I knew after I was informed of it by Mr. Rodgers.

Q. Did you see Mr. Tobriner at that time? A. No, sir.
Q. Did you shortly after that go to see Mr. Webb? A. No, sir.
Q. Are you positive about that? A. Very positive.
Q. Did you go to see him about that time and seek to enter into negotiations with him with respect to a new lease? A. I went to see him about a lease, but not about taxes.

267 Q. When was it that you went to see him about a lease? A. I cannot exactly recall the time or the year; but I did go to see him to get a longer lease.

Q. Was it before you had seen Mr. Tobriner? A. Mr. Tobriner had not been called in on this matter at all, at that time.
Q. You are positive about that? A. Yes, sir.
Q. Why was it you wanted to get a new lease? A. We wanted a longer lease. I not only wanted a longer lease, but I wanted to buy the property. We wanted to have the protection of a longer lease. It only ran until 1907 or 1908, and we wanted a longer term, which every business man wants on a piece of property if he can get it.
Q. How long had the unexpired term of your lease to run when you went to see Mr. Webb, in 1901, to get a new lease? A. I could not exactly say, but possibly six or seven years.
Q. Did you not then know, when you went to see Mr. Webb, that this property had been sold for taxes, and Mr. Wiltsie had bought it? A. No, sir.
Q. You are positive of that? A. Yes, sir.

Q. Had you not consulted Mr. Tobriner about it before you
268 went to see Mr. Webb? A. No, sir.
Q. You are positive about that? A. Yes, sir.

Mr. PERRY: That is all I want to ask this witness, except with respect to these papers in the equity suit, and I will reserve the right to cross-examine him on that point.

Cross examination.

By Mr. JOHNSON:

Q. Will you tell me, if you please, when the firm of Caroline King & Sons was formed? A. My mother gave us an interest in the business in the spring of 1898.
Q. Will you tell us who composed that firm? A. My brother Joe, my mother, my brother Abe for a short while, and myself.
Q. Were there any written articles of partnership? A. No, sir.
Q. Did you, between August 1897 and May 1901, go to the tax office yourself about any taxes? A. I may have had occasion to go there.
Q. Did you? A. I suppose I did.
Q. Can you tell us about what property you went? A. About the estate.
Q. About what property? A. I could not tell you what particular property.

269 Q. Did you get any bills? A. Occasionally.
Q. Did you pay any yourself? Sometimes.
Q. I mean did you go there and deliver the checks? A. Sometimes I would take a check there when I was out, going that way, and did not want to take my bookkeeper away from his business.
Q. Did you ever pay taxes there except by check? A. Myself?
Q. Yes. A. No, sir; not that I remember.
Q. Did you ever authorize any to be paid except by check? A. I cannot say that. I can't remember that.
Q. Who was authorized to draw checks relating to the business which your mother purchased in August, from August 1897 up to the spring of 1898? A. I had a power of attorney.
Q. Did anyone else have authority? A. I don't think so; I cannot say.
Q. So that the only persons who were authorized to draw checks were you and your mother? A. I think that is the case. My brother also may have had a power of attorney. I don't remember that.
Q. After the spring of 1898, when this firm was formed, who had authority to draw checks? A. My brother and mother and myself.
Q. There were three sons, you, Joseph and Abraham? A. Yes, sir.
270 Q. Abraham went out when? A. In a very short while.
Q. Was it a year? A. No, sir.
Q. A few months? A. Three or four months.
Q. And the business is still owned by your mother and your brother and yourself? A. Yes, sir; we have an interest in the business.
Q. Those three? A. Yes, sir.
Q. They are the only persons in the firm? A. Yes, sir.
Q. Each one of you three, since that firm was formed, had authority to sign checks? A. Yes, sir; I think that a short while ago we gave my brother Phil power to sign checks.
Q. He is not a member of the firm? A. No, sir. I can tell you why that was done if you would like to know.
Q. No; it does not interest me. When was the receivership on your father's estate created by the court? A. I think some time about a year afterwards or possibly three months longer. I can get the exact date.
Q. Has that receivership been terminated? A. No, sir.
Q. It still subsists? A. Yes, sir.
Q. So that prior to 1900 what you call the estate of your
271 father was in the hands of receivers? A. Before that.
Q. I say that prior to 1900 and up to the present time the estate of your father has been in the hands of receivers? A. Yes, sir.
Q. And those receivers are yourself and Judge Barnard? A. Yes, sir.
Q. Has that receivership any personal property? A. Yes.

Q. What was the character of the personal property? A. There was some money which I hold now as administrator. Besides the receivership I am also acting as administrator.

Q. I am asking about the receivership. Did the receivership have any personal property? A. It did not at that time; but since then we are putting personal property into the receivership, in the way of syndicate property. Through the advice of my attorney, and acting in conjunction with the creditors, we have decided that syndicate property, such as land, which is owned by syndicates in which my father was interested, when sold, should be turned into the receivership account. Do I make myself clear to you?

Q. Yes; but I am not inquiring about that. Did the receivers get possession of any of the merchandise that belonged to
272 your father? A. No.

Q. Is it not a fact that all the receivership got charge of, belonging to your father, was the real estate which he owned, or in which he was interested? A. Yes, sir.

Q. That is right, is it? A. Yes, sir.

Q. You derived some funds from the real estate of which you were the receiver? A. Yes, sir; there were funds derived from it, and funds disbursed.

Q. Were the funds of that receivership kept in bank? A. Yes, sir.

Q. Were those funds put on deposit to the credit of Caroline King and Sons? A. No, sir; they were deposited to the credit of the account of Job Barnard and Harry King, receivers.

Q. And you two were the only persons who dealt with that fund, or drew any checks on it? A. Yes, sir.

Q. Who kept the accounts of the receivers? A. They were kept in my office.

Q. Who kept them? A. Our bookkeeper.

Q. This same Mr. Rogers? A. And his predecessor.

Q. Alexander? A. Yes, sir.

Q. Neither of them drew any checks on that account? A.
273 They drew checks and we signed them.

Q. I mean that they did not sign checks? A. No, sir.

Q. I think you said there were some forty pieces of property belonging to that estate? A. Yes, sir.

Q. And to that receivership? A. In the neighborhood of that number.

Q. Have you any idea of the number of those pieces of property that were ever sold at tax sale? A. No, sir; I have no idea of the number of them that have been sold.

Q. Can you tell whether there were three or thirty? A. There were some sold at different times, which were redeemed whenever we got the money. Unfortunately the estate did not have much money.

Q. Don't you know whether there were three or thirty? A. Don't try to tie me down to any certain number. I can merely tell you

that at times there were various pieces of property involved in the non-payment of taxes which the receivers did not have the funds to meet.

Q. You cannot tell me whether you redeemed as many as three sales? A. Yes; a great many more than that.

Q. Do you think you redeemed as many as ten? A. Possibly.

Q. Have you any idea how many were redeemed between the commencement of the receivership and the spring of 1900?

274 A. No, sir; I cannot tell you.

Q. Had any of those arrears of taxes subsisted prior to your father's death? A. Yes, sir.

Q. Had you had anything to do with paying the taxes on his estate during his lifetime? A. As I have stated before I occasionally paid the taxes.

Q. For him? A. Yes, sir; of course.

Q. And you got the tax bills? A. I suppose they are at the store.

Q. I want to know whether you actually went to the tax office and got the tax bills, and paid them during your father's lifetime? A. Once in a while; yes, sir.

Q. Can you tell us whether or not any of the property was ever sold for taxes, and redeemed, in his lifetime? A. I think it was.

Q. For how long a time before his death had there been default and arrearages of taxes? A. That I could not answer.

Q. Can you say whether it was three years or five? A. I cannot answer you that. It might have been six months and it might have been a year; I cannot say.

Q. How old are you? A. I am thirty-eight years old.

Q. So that in 1897, when your father died, you were thirty-

275 three? A. Make your deduction, and whatever deduction you make, if it is proper, it will be correct.

Q. How long were you associated with your father, assisting him in business before his death? A. Since about 1888, I should say.

Q. That is in the neighborhood of nine years? A. About that.

Q. During all that time, did he own real estate? A. Yes, sir; unfortunately.

Q. You got your first information about the sale of this Market Space property for taxes from Mr. Wiltsie's letter? A. Yes, sir.

Q. You said you knew Mr. Wiltsie as a tax speculator? A. Yes, sir.

Q. How long had you known him to be a man engaged in that business? A. That I could not say.

Q. Could you say whether it was a month or six months or a year or three years? A. I think it was a few years.

Q. Had you ever had any transactions with him in your father's lifetime? A. I never had to my knowledge.

Q. Do you know of your father ever having had any? A. That I could not say.

Q. Did you keep an account of the taxes you paid as receiver?

A. We kept a general account of everything in the books,
276 of course.

Q. Where are those books? A. They are at the store.

Q. They are under your control? A. Yes, sir.

Q. Did you pay any taxes in the spring of 1898 on the property of which you were receiver? A. I really could not tell you.

Q. Did you in July 1899? A. I could not tell you that.

Q. Did you in the spring of 1900? A. I could not say. I can refer to the books and let you know if you want me to.

Q. I would like to know. A. I will give you that information.

Q. How frequently between May 1899 and *the* May 1901 did you pay taxes on the property of which you were receiver? A. I couldn't tell you that. We were constantly paying taxes of all kinds.

Q. Can you give me any idea? A. No, sir; I could not. That is a thing I allowed the bookkeeper to attend to.

Q. Will you tell me whether you, yourself, went to the tax office to pay any taxes, or to inquire about taxes, between December, 1897, and July 1898? A. I could not tell you.

Q. Can you tell me whether you went at any time between
277 July 1898 and July 1899? A. I may have; I could not state positively.

Q. How about the following year, between July 1899 and July 1900? A. I may have gone during that period.

Q. I am trying to ask if you have any recollection of it? A. I have no recollection, but I may have gone there.

Q. What was your special connection, if any, with the mercantile business that your mother and you carried on? A. I am the general manager of the business.

Q. That does not explain the matter to us. We do not understand these things. Do you have anything to do with the conduct of the stores themselves? A. Yes, sir; the supervision of the stores, the buying, the clerks, and everything.

Q. What relation did your mother have to the business? A. My mother occupied a position in charge of the salesroom, when she was there.

Q. She had an active connection with the business? A. Not active at all times, but active at some times. My mother has not been a well woman. She has been quite sick, and she has been out of the store for some time.

Q. Who, if anybody, chiefly had charge of the finances? A. I had charge of the finances.

Q. When you refer to the families that were dependent on the success of that business did you refer to yourself? Were you married? A. Yes; happily.

278 Q. And your brother? A. Yes, sir.

Q. Both of them? A. Yes, sir.

Q. Your mother had no young children? A. No, sir.

Q. I will have to trouble you to tell me what is the relative interest of yourself, your brother, and your mother in that business? A. We have a one-third interest in the profit of the business.

Q. Each of you? A. Yes, sir.

Q. Your interests are equal? A. Yes, sir. A one-third interest in the profits.

Q. Do you own, equally, the assets, and equally liable for the debts?

Mr. DARLINGTON: I object to calling on the witness for a legal opinion of what his liability is.

Q. What is your understanding of the agreement with respect to that? A. We have no agreement.

Q. You mean you have no written agreement? A. No, sir.

Q. Have you an interest in the business? A. I have a one-third interest in the profits of the business.

Q. And no interest in the losses? A. I don't know.

279 Q. Have you any interest in the assets? A. I could not answer that.

Q. You don't know? A. No, sir.

Q. You don't know whether or not you have an interest in any of the assets? A. No, sir.

Q. Does any of the merchandise in either of those stores belong to you? A. I really could not tell you.

Q. Have you any way of finding out? A. Not that I know of. It is a family affair, strictly.

Q. Still it is a firm? A. We call it so, yes, sir.

Q. Do you know whether your brother Joseph has any interest in the merchandise in those stores? A. He has the same interest in the business that I have.

Q. Do you know whether your mother has any? A. Yes, sir.

Q. But you don't know whether you own any part of it or not? A. No, sir.

Q. You don't know whether you are a partner or not? A. I have an interest in the business, and if you consider that a partnership, all right.

280 Q. Do you know in what month in the spring the firm was formed? A. That I could not say.

Q. Was it before or after May, 1898? A. It might have been after and it might have been before May. I could not tell you the exact date.

Q. It was in the spring? A. Yes, sir, in the spring.

Q. What did the assets then consist of? A. The general assets of the business.

Q. How was the rent for the property paid? A. The rent was paid out of the business.

Q. Out of the firm account? A. Yes, sir.

Q. To Mrs. Kennedy? A. Yes, sir.

Q. Up to 1901? A. Yes, sir; up to 1901.

Q. The rent, I believe, was $200 a month? A. $200 a month.
Q. Was it always paid by check? A. Yes, sir; to the best of my knowledge it was.
Q. By the check of the firm? A. Caroline King & Sons.

Mr. JOHNSON: I may possibly want to ask the witness about the interview with Mr. Kann; and I will reserve the right to further cross examine him.

281 Redirect examination.

By Mr. DARLINGTON:

Q. Mr. King, Mr. Perry hands me four letters which were submitted to him, which he desires to go into the record. Please look at them and state if you know in whose handwriting they are? A. They are in the handwriting of Mrs. Kennedy.

It is agreed by and between counsel that the four letters above mentioned, marked respectively, Exhibit H. K. No. 16, H. K. No. 17, H. K. No. 18 and H. K. No. 19, may be filed in evidence in this cause.

The said letters are in the words and figures following to wit:

H. K. No. 16.

EAGLES MERE, PA., *August 1st*, 1899.

To Mrs. King & Sons:

I have to thank you again for your promptness in sending the rent—it came most opportunely—as I had not enough in my possession to pay this week's board.

I have no doubt that you will now, as always, protect my interest and hope that you will have the matter of the crack in the wall adjusted to our satisfaction. I am enjoying delightfully cool weather, we find up here in the mountains—& feel that I am gaining strength & health every day—

Hoping that you will keep well—I am very truly yours—

M. A. B. KENNEDY.

282 AUG. 1ST, 1899.

Received of Mrs. Caroline King and Sons, $200 for rent of store 715 Market space.

M. A. B. KENNEDY.

H. K. No. 17.

1630 R. I. AVENUE, *Feb. 3rd*, 1893.

To Mr. H. King, Jr.:

Please send rent of London Bazaar by my servant man—and hereafter can you not send it by mail—as it would save me the trouble of sending a messenger.

I should like a copy of the last lease—Mr. Kennedy kept always copies of any lease given, & it is the proper business way.

Y'rs respectfully, M. A. B. KENNEDY.

H. K. No. 18.

1630 R. I. AVE., *May 16th*, '94.

To Mr. H. King, Jr.:

As my tax payments will have to be made this month, I write to remind you, that I shall hope to receive the amount for store London Bazaar, by, or before the 25th as I wish to pay *all* on that day.

283 My taxes are all increased.

Very respectfully, M. A. B. KENNEDY.

H. K. No. 19.

1630 R. I. AVE., *Jan. 7th*, 1895.

To Mr. King:

DEAR SIR: I sent a note to you on Saturday—requesting you to send check for rent of store on Market space, of which I am in need at once.

I hoped you would either mail it or deposit it in Bank of the Republic—I keep no man servant now, & it is a great deal of trouble to send for it every month.

Very truly yours, M. A. B. KENNEDY.

200.00
31.30

168.70

Mr. DARLINGTON: Would it be possible for you gentlemen to produce the letter from Caroline King & Sons of July 29th, 1899, to which this letter of August 1st is a reply; and also a letter of August 2nd, 1899?

Mr. WEBB: If I have them I will produce them.

Mr. DARLINGTON: We have carbon copies of them here.

By Mr. DARLINGTON:

Q. Please look at what purport to be carbon copies of two
284 letters to Mrs. M. A. B. Kennedy, one dated July 29th, 1899, and one August 2nd, 1899, and state if you can, whether you sent the letters of which these are carbon copies to Mrs. Kennedy at or about these dates? A. Yes, sir; I sent these letters.

Mr. DARLINGTON: We offer these carbon copies in evidence, agreeing that if the originals can be found they may be substituted for the copies.

The above-mentioned letters are marked Exhibit- H. K. No. 20, and H. K. No. 21, and are in the words and figures following, to wit:

Ex. H. K. No. 20.

JULY 29, 1899.

Mrs. M. A. B. Kennedy, Eagles Mere, Pa.

DEAR MADAM: Enclosed please find check of $200.00, being rent of # 715 Market space for the month of August 1899. Kindly acknowledge receipt of check and oblige.

Replying to your favor of July 28th we beg to say that we had our architect, Mr. Stutz, examine the building as soon as we noticed the crack. He states that the damage is due to the work done by Kann's contractors in making their repairs. We then had the building inspector examine the wall.

We are going to protect your interests in every possible way and we believe we can have the damage remedied without any further trouble or expense to you.

Trusting that you are enjoying the best of health, we are
285 Respectfully yours.

Ex. H. K. No. 21.

AUGUST 2, 1899.

Mrs. M. A. B. Kennedy, Eagles Mere, Pa.

DEAR MADAM: I enclose you a copy of the notice which the building inspector wishes to be sent to you.

You will see that the fault does not lie with the Kanns in making their repairs, but the wall was itself defective and Kann's repairs exposed it.

If you care to place the matter in my hands, I will see the building inspector and, if possible, will try and see that Kanns bear the entire expense. If this cannot be done, I will see that you are protected and as little expense placed on you as possible.

I know this matter is annoying, but you can readily see that the fault is not ours.

I explained to the building inspector and Mr. Kann this morning that it was not very pleasant to have you annoyed in this manner while you are away, but as they have sent us notice, I am compelled to send it to you.

Please advise me as soon as possible, and I will attend to the matter for you. I will use every endeavor to protect your interests.

Sincerely yours,

286 By Mr. DARLINGTON:

Q. I observe that the carbon copies are not signed. I suppose the originals were signed. A. The originals were signed, and the carbon copy is kept by the stenographer.

Q. What contribution, if any, to the capital stock of the business, was made by yourself and your brothers? A. Not any.

Q. For what are you to receive one third of the profits? A. For our services.

Q. I will ask you to look at these papers, purporting to be fourteen receipts, which I now hand you, and state in whose handwriting they are? A. They are in the handwriting of Mrs. Kennedy.

Mr. DARLINGTON: I offer these receipts in evidence.

The above mentioned receipts are filed herewith, marked respectively Exhibits H. K. No. 22, H. K. No. 23, H. K. No. 24, H. K. No. 25, H. K. No. 26, H. K. No. 27, H. K. No. 28, H. K. No. 29, H. K. No. 30, H. K. No. 31, H. K. No. 32, H. K. No. 33, H. K. No. 34, H. K. No. 35, and the same are in the words and figures following to wit:

Ex. H. K. No. 22.

1620 R. I. AVE., *April 2d.*

Received of Mrs. Caroline King and Sons—$200. for rent of store 715 Market space—for the month of April—

M. A. B. KENNEDY.

287 Thank you for your promptness in sending it.

Ex. H. K. No. 23.

HOTEL EAGLES MERE,
EAGLES MERE, PA., *Aug. 4th*, 1898.

Mrs. King & Sons:

With many thanks I acknowledge the receipt of check for $200—for rent of store on Market space for the month of August.

I am feeling well in this lovely mountain air—where we are escaping the heat, that was so hard to endure before leaving Washington.

Very respectfully, M. A. B. KENNEDY.

Ex. H. K. No. 24.

1630 R. I. Avenue, *May 3rd*, 1898.

For Mrs. Caroline King & Sons:

Received this day May 3d $200—for rent of store 715 Market space city—for month of May—

Very respectfully, M. A. B. KENNEDY.

288 Ex. H. K. No. 25.

1630 R. I. Ave., *July 2d*, 1898.

Received of Mrs. King & Sons, two hundred ($200) dollars for rent of store 715 Market space for month of July.

M. A. B. KENNEDY.

I should have sent this by mail yesterday but having neglected it—send it by Washington Please change $20 note—1-ten—1 five—4 ones—1 silver.

Ex. H. K. No. 26.

1630 R. I. Ave., *June 1st*, 1898.

To Mrs. Caroline King & Sons:

Received $200 for rent of store 715 Market space for month of June.

With many thanks for your promptness—

I am yours very truly, M. A. B. KENNEDY.

Ex. H. K. No. 27.

November 3d.

Received of Mrs. King & Sons for rent of 715 Market space for month of November $200.

M. A. B. KENNEDY.

289 I have been very sick in bed, or would have sent this earlier.

M. A. B. K.

Ex. H. K. No. 28.

1630 R. I. Ave., *Dec. 1st*, 1898.

Received of Mrs. Caroline King & Sons $200—for rent of store 715 Market space for Dec'r 1898.

Very respectfully, M. A. B. KENNEDY.

Ex. H. K. No. 29.

1630 R. I. Ave., *Feb.* 1*st*, 1899.

Received of Mrs. King & Sons—two hundred dollars, ($200) for rent of 715 Market space for the month of Febr.

M. A. B. KENNEDY.

Ex. H. K. No. 30.

1630 Rhode Island Ave., *May* 2*d*, '99.

290 Received of Mrs. Caroline King and Sons—for rent of 715 Market space for one month—$200.00 (two hundred) dollars.

Mrs. M. A. B. KENNEDY,
1630 *R. I. Ave.*

Ex. H. K. 31.

Eagles Mere, Pa., *Sep'r 5th*, 1899.

To Mr. King:

Received of Mrs. Caroline King & Sons—$200 for rent of store # 715 Market space—

M. A. B. KENNEDY.

Please pardon my delay in answering your letter, and acknowledging the check. I have written 5 letters, sending off enclosures in each—& felt sure I had sent one to you also until I consulted my letter register—I find that is a duty unfulfilled till now—Thank you for your continued interest in the house, which I hope may be attended to by Kann without further trouble—I would not consent to his putting up a 3 story building in the rear—as we have reserved the right to keep the back of the store light.

Very truly yours, M. A. B. KENNEDY.

291 Ex. H. K. No. 32.

Oct. 4th, 1899.

Received of Mrs. Caroline King & Sons—$200, for rent of store 715 Market space.

M. A. B. KENNEDY.

Thank you for your usual promptness in sending check.

M. A. B. K.

Ex. H. K. No. 33.

1630 R. I. AVE., *Jan.* 1*st*, 1900.

To Mrs. Caroline King & Sons:

Thank you very much for your promptness in sending your check to me on *New Year's day*—as the *first* of the *month*, and *first* of the year, generally finds me with but very little in my pocket—

With my best wishes for a "Happy New Year" to you all, believe me sincerely yours

M. A. B. KENNEDY.

Ex. H. K. 34.

1630 R. I. AV., *Feb.* 2*d*, 1900.

Received this day check for $200 from Mrs. Caroline King & Sons for rent of store 715 Market space for Febr. 1900.

292 M. A. B. KENNEDY.

With thanks for prompt payment.

Ex. H. K. 35.

1630 R. I. AVE., *March* 2*d*, 1900.

Received of Mrs. King & Sons $200—for rent of store 715 Market space—for month March

MRS. J. C. KENNEDY.

MONDAY.—Neglected to send this the day it was writ-en.

The further taking of these depositions was thereupon adjourned until Thursday, March 19th, 1903, at 3 o'clock p. m.

293 WASHINGTON, D. C., *March* 19*th*, 1903—3 o'clock p. m.

Met pursuant to adjournment at the office of Leon Tobriner, Equity building, Washington, D. C.

Present on behalf of the complainants Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendants, Mr. Perry and Mr. Johnson.

PHILIP KING, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. DARLINGTON:

Q. Mr. King, you are a son of the complainant, Caroline King? A. Yes, sir.

Q. Did you know the late Marianne A. B. Kennedy? A. Yes, sir.

Q. What interest, if any, have you in the business? A. None at all.

Q. Do you know when the change was made in the front of the premises No. 715 Market space? A. Yes, sir; I do.

Q. State whether you were present at an interview between your brother, Mr. Harry King and Mrs. Kennedy before that work was done? A. Yes, sir; I was.

Q. Where was the interview held? A. In Mrs. Kennedy's
294 house.

Q. Please state what took place on that occasion. A. Some time in the spring of 1898, April or May, my brother asked me to go up to Mrs. Kennedy's——

Q. By your brother you mean whom? A. My brother Harry. We went up there and he spoke to Mrs. Kennedy and told her he contemplated improvements. She seemed very much pleased and gave her consent to the same.

Q. Were the improvements subsequently made? A. Yes, sir.

Q. Please state just what they were. A. The side entrance was removed, the windows were changed, and on the second story a small partition was taken out.

Q. How long have you known the premises, Mr. King? A. As long as I can remember.

Q. How far back? A. Fifteen years.

Q. When you first knew the premises, what portions of it were used for store purposes? A. The first and second stories.

Q. How were they connected? A. They were connected by a stair in the rear, leading from the first story to the second.

Q. How are they connected now? A. They are connected now by just that entrance—that connection.

295 Q. What change, if any, has taken place in the use to which the second story has been applied since you first knew the property? A. None whatever.

Q. How was the third story used when you first knew the property? A. As a residence.

Q. Is it so used now? A. No, sir; it is now vacant.

Q. Except for purposes of residence and except when vacant, what use has been made of it? A. Why, offices—business purposes.

Q. I asked what use has been made of it except for residence. A. For purposes of business, storing things up there.

Q. How is it now? A. Now the first and second stories are the business portion and the third story is not used for anything that I know of.

No cross examination.

PHILIP KING.

Subscribed and sworn to before me this 13th. day of May 1903.

JOHN W. HULSE,
Examiner in Chancery.

296 HARRY KING resumed the stand for further direct examination

By Mr. DARLINGTON:

Q. Mr. King, I understand you desire to make a correction in your testimony in regard to what you have said about the rent of 715 Market space having been paid for the month of August, 1897, at the time of your father's death. Just state what that correction is. A. Yes, sir; I wish to make a correction in that statement that I made, that I was under the impression that the rent had been paid, because I had Mrs. Kennedy a check sent on August 11th, to Eagles Mere, Pennsylvania.

Q. For what? A. For the rent of 715 Market space.

Q. For what period? A. For the month of August. I have found that this check reached the bank after my father's death, and on account of his death the payment on the same was refused.

Q. Have you the check to which you refer? A. Yes, sir; this is the check (indicating).

Q. In whose handwriting is the signature? A. The signature is in my handwriting, sir, signed under a power of attorney.

Q. Please look at the endorsement and state in whose handwriting that is? A. The endorsement is in the handwriting of Mrs. Kennedy.

297 Q. Can you tell us why that check is for $175 instead of $200? A. That I have been endeavoring to find out, but there must have been deductions to be made for some repairs of some kind. I know she accepted the check.

Mr. DARLINGTON: We offer this check in evidence.

Said check is filed herewith marked H. K. No. 36, and is as follows:—

H. K. 36.

$175. WASHINGTON, *Aug.* 11, 1897. No. 5022.

Lincoln National Bank of Washington, D. C., cor. 9th & D Sts.,

Pay to the order of M. A. B. Kennedy $175.00 one hundred and seventy five 00/100 dollars.

H. KING, JR.,
Per HARRY KING, *Att'y.*

Endorsed: M. A. B. Kennedy."

By Mr. DARLINGTON:

Q. Please look at two checks I now hand you, both dated June 7, 1897, and state if you can what they represent. A. One of them represents a rent check to Mrs. Kennedy of $177.20, and the other represents a check of $22.80, which was paid to W. O. Berry for some repairs.

Q. Why was not the full amount of rent paid to Mrs. Kennedy on that occasion? A. Mrs. Kennedy requested us to pay Mr. Berry that bill.

Q. So that some times deductions were made by her authority? A. Yes, sir.

Mr. DARLINGTON: These two checks are offered in evidence.

298 Said checks are filed herewith, marked H. K. Nos. 37 and 38, and are in the words and figures following, to-wit:

H. K. No. 37.

$22. WASHINGTON, D. C., *June* 7, 1897. No. 4586.

Lincoln National Bank of Washington, D. C., cor. 9th & D Sts.,

Pay to the order of W. O. Berry $22.80 twenty-two 80/100 dollars.

H. KING, JR.

Endorsed: W. O. Berry."

H. K. No. 38.

$177. WASHINGTON, D. C., *June* 7, 1897. No. 4585.

Lincoln National Bank of Washington, D. C., cor. 9th & D Sts.,

Pay to the order of M. A. B. Kennedy, $177.20 one hundred seventy-seven 20/100 dollars.

H. KING, JR.

Endorsed: M. A. B. Kennedy."

By Mr. DARLINGTON:

Q. What information can you give us, Mr. King about when or in what manner the August, 1897 rent was in fact paid to Mrs. Kennedy? A. After I received a protest notice of the check not being paid, I knew that Mrs. Kennedy depended upon these funds for her existence at the summer resort where she was, and a few days later I borrowed $200 and sent it to her for the payment of the rent.

Q. From whom did you borrow that money? A. I borrowed this money from Mr. Stoll, a neighbor of mine.

299 Q. Why did you not draw a check on this bank which had refused your father's check? A. Because we had no account there and they wouldn't pay any check on my father's account, on account of his being dead.

Q. What was the balance in bank on which this check was drawn? A. We had in that one bank over $1500, I think, at the time of my father's death.

Q. What is the check I now hand you? A. That is a check signed by me as administrator *c. t. a.* on the estate of H. King, Jr., made payable to the order of William H. Stoll, for $200, and marked a/c of rent, M. A. B. Kennedy, dated August 30th, 1897.

Q. Why did you pay Mr. Stoll $200? A. Because I had borrowed the $200 from him.

Q. This check then was to replace that amount? A. Yes, sir; from my administrator account.

Q. Do you remember in what manner you paid to Mrs. Kennedy the $200? A. I can't recall now whether I deposited $200 in the National Bank of the Republic for Mrs. Kennedy or whether I sent her Mr. Stoll's check payable to her order or not. I can't exactly recall it.

Q. Where is Mr. Stoll? A. Mr. Stoll, I am sorry to say, is dead.

Q. Do you know his handwriting? A. Yes, sir.

300 Q. In whose handwriting is the endorsement on this check? A. It is in the handwriting of Mr. Stoll, and the payment of the Lincoln National Bank stamp is on the back.

Mr. DARLINGTON: We offer this check in evidence.

The check last identified by the witness is offered in evidence by counsel for the complainant, and the same is filed herewith, marked H. K. 39, and is in the words and figures following, to wit:

H. K. 39.

No. 10. WASHINGTON, D. C., *August 30th*, 1897.

The Central National Bank of Washington City

Pay to the order of W. H. Stoll two hundred ^{00} dollars (a/c of rent M. A. B. Kennedy).

$200.00/100 HARRY KING,
Adm'r c. t. a.

Endorsed: W. H. Stoll, mngr.

Stamped on back: Lincoln national bank, Washington, D. C. Sep. 1 1897

301 Cross examination.

By Mr. PERRY:

Q. Mr. King, I desire to call your attention to a question and answer at the conclusion of your direct examination the other day. I want to refresh your memory about it. On page 139, Mr. Darlington says:

"Q. One further explanatory matter. It is claimed in one of the answers that in an equity suit of The Ohio National Bank *vs.* Caroline King, No. 19338, on the equity docket of this court, you stated that this lease was in default for rent and liable to be forfeited. Is that correct?"

Your answer is:

"That had no reference to 715 Market space. That had reference to the store on 7th street. The rent for them had been unpaid."

Do you recall that language? A. I recall that; yes, sir.

Q. That is correct, is it? A. No, sir; it is not correct.

Q. Is the answer correct? A. The answer you read to me just now is the answer I gave the other day.

Q. I say is that answer correct? A. No, sir; it is not correct, and I wish to make the correction.

302 Q. Let us hear what the correction is. A. The correction is that this check that I sent on August 11th to Mrs. Kennedy, after examining and finding out all the matter that I could get referring to this case—I did not know or did not remember at this time that the check had not been paid, but since then I have refreshed my memory and I find that that check had not been paid. Therefore it left the rent of the Market Space store unpaid.

Q. Will you look at a paper I hand you, which is a certified copy of a petition filed by you in the supreme court of the District of Columbia on the 25th of August, 1897, and after reading it, say whether or not to the best of your knowledge you made the statements contained in that petition? A. Shall I read this aloud or to myself?

Q. As you please.

Mr. DARLINGTON: Suppose you read it aloud, and then I will hear it. I have not seen it.

(The witness read the paper aloud.)

By Mr. PERRY:

Q. You have read that. Did you swear to those statements on the day I have named there? A. Yes, sir.

Q. Were they true when sworn to? A. I see there is one here, where it says "Leasing premises No. seven hundred and fifteen (715) Market space, for a term of five (5) years from the eighth (8) day of October A. D. 1896." That is not correct.

Q. It is a mistake is it not? A. That is a mistake.

Q. I will ask you about that in a moment. With that ex-
303 ception, it was true when you swore to it? A. Yes sir.

Mr. PERRY: I offer that petition in evidence.

Said paper is filed herewith, marked H. K. Cross Ex. No. 1, and is as follows:—

304 EXHIBIT H. K., CROSS EXHIBIT NO. 1.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In re HENRY KING, JUNIOR, Deceased.

To the honorable the justice of said court:

The petition of Harry King, who is the duly appointed and qualified administrator *c. t. a.* of the estate of said deceased, respectfully shows:

First. That among the assets belonging to the estate of said deceased is the stock in trade and fixtures in stores numbered eight hundred and twelve (812) and eight hundred and fourteen (814) Seventh street northwest, and seven hundred and fifteen (715) Market space, in the city of Washington, D. C., also three (3) horses, two (2) wagons, one (1) coupé, one (1) buggy, one (1) carriage and one (1) lot of harnesses used in connection with the said stores and which has been appraised by the duly appointed appraisers of this court as of the value of three thousand three hundred and fifteen ($3,315.00) dollars. The said stock in trade consists mainly of millinery goods left over from last season's business and as a result the same are of little or no value as compared to their original cost, and could not be sold at public auction, for anything near the amount at which they have been appraised.

Second. Your petitioner further shows that in connection
305 with the said business and among said assets, are lease for premises numbered eight hundred and twelve (812) Seventh street, N. W., executed by Michael Briel to the said Henry King Junior, creating a term of fifteen (15) years from the first day of January, A. D. 1890, at a monthly rental of three hundred ($300.00) dollars—second a lease from Parthenia Thyson, bearing date the twenty-sixth (26) day of February, A. D. 1890 for premises numbered eight hundred and fourteen (814) Seventh street, N. W., for a term of twenty (20) years, at the monthly rental of two hundred and twenty-five ($225.00) dollars—third—lease from Marianne A. B. Kennedy, leasing premises numbered seven hundred and fifteen (715) Market space for a term of five (5) years from the eighth (8) day of October, A. D. 1896, at a monthly rental of two hundred ($200.00) dollars, besides the payment by the lessee of all taxes assessed against the real estate upon which said improvements stand.

Third. The petitioner further represents that he has requested the said appraisers to place a value upon the said several leasehold interests but that the said appraisers refuse to do so, claiming that the rent reserved by the said several leases is larger and greater than what the said premises would at the present time, rent for under a new lease; and your petitioner believes that such is the

case and that the said leasehold interests are of no practical value as an asset of the said real estate.

Fourth. Your petitioner further shows that he has received an offer of thirty-five hundred ($3500.00) dollars cash from Caro-
306 line King, the widow of the said Henry King Junior, for the purchase of the said stock in trade and fixtures and said leasehold interests, and that he feels satisfied, from his intimate acquaintance with the character of said stock, having been many years engaged in the millinery business, that nothing like its assessed value can in any other manner, be realized.

Fifth. That the said stock is daily depreciating and the expenses for keeping the same in order and the rent of the said stores is continually increasing, so that it would be to the advantage of the said estate that the same should be disposed of immediately.

He therefore prays——

1. That he be permitted to sell the said stock and fixtures and leasehold interests at private sale for a sum not less, for the said stock and fixtures than their appraised value.

2. That he have such other and further relief as the nature of the case may require.

HARRY KING.

I, Harry King, on my oath do depose and say that I have heard read the foregoing petition by me subscribed, and know the contents thereof; that the statements therein made from my personal knowledge are true, and that those stated upon information and belief, I believe to be true.

HARRY KING.

Subscribed and sworn to before me this 25th day of August, A. D. 1897.

S. THOMPSON, JR.,
Acting Register of Wills, D. C.

307 By Mr. PERRY:

Q. With reference to what you have just spoken of, I will ask you if the fact is not this, that at the time when you made that statement, the lease of these premises 715 Market space did not extend until the 1st of October, 1898, with an additional term of ten years. Is not that the fact? A. It did extend an additional term of ten years.

Q. How came you to make such a mistake as that? A. Well, I gave my attorney the lease to copy it from.

Q. Have you any other explanation? A. I haven't any other explanation to offer for that, sir. It is a typographical error, I suppose.

Q. A considerable typographical error; yes. On the 24th of June, 1901, there appears to have been a third amended bill filed by the Ohio National Bank of Washington and the Second National

Bank of Washington against Caroline King and others, that bill being No. 19338, on the equity docket of the supreme court of the District of Columbia. Have you any recollection with respect to the matters averred in that bill? A. I have some.

Q. I understood you to swear here the other day, in answer to a question of Mr. Darlington that that proceeding did not embrace the lease connected with 715 Market space. Am I correct about that, or did you mean to say that? Let me refresh your memory. I read from page 149 of the testimony:

"That had no reference to 715 Market space. That had
308 reference to the store on 7th street."

Mr. DARLINGTON: What is "that"?

Mr. PERRY: The question I have already read. I will read it again:

"It is claimed in one of the answers that in an equity suit of The Ohio National Bank *vs.* Caroline King, No. 19338, on the equity docket of this court, you stated that this lease was in default of rent and liable to be forfeited. Is that correct?"

The answer is:

"That had no reference to 715 Market space. That had reference to the store on 7th street. The rent for them had been unpaid."

A. I have made the explanation of my correction to that effect, and my answer in that pleading is correct.

By Mr. PERRY:

Q. Did you desire, by that answer, to convey the impression that this equity proceeding did not relate to the leasehold upon the premises 715 Market space? A. No, sir; I did not.

Q. What impression did you desire to convey? A. The impression that I desired to convey was that my statement now is that I was mistaken at the time I said that, on account of what I have found in reference to the checks.

Q. Just read this paper to yourself, purporting to be a certified copy to that third amended bill, and see whether or not it is to the best of your recollection a copy of that bill. A. (After
309 reading paper.) I have read it.

Q. Will you state whether or not you read that amended bill and whether or not you swore to this answer to it? (Handing witness a paper.)

Mr. DARLINGTON: One at a time. First, whether he read the bill.

By Mr. PERRY:

Q. Did you read it before you answered it? A. Yes, sir.

Q. I ask you now whether that paper I now show you is a true copy of your answer.

(The witness reads the paper referred to.)

Mr. PERRY: The originals of both these papers are here gentlemen, if you want to look at them.

By Mr. PERRY:

Q. Have you read it? A. Yes, sir.

Q. Is that the answer you filed at that time to this paper which you read before? A. Yes, sir.

Q. Were the facts in it true at the time? A. Yes, sir, to the best of my knowledge.

Mr. PERRY: I want to offer in evidence the third amended bill and the answer to it.

Mr. DARLINGTON: I would suggest that if there is anything in the answer which counsel consider untrue, it would be perhaps a little more fair to the witness to call his attention to it.

Mr. PERRY: I thought his attention had been abundantly
310 called to it by the questions you asked him and modifications he made this morning. I can, however, question him in regard to the details of the answer if you think there is anything unfair about it.

Mr. DARLINGTON: If there is anything in it that appears to counsel inconsistent with his testimony in this case, perhaps it would be a little more fair to point it out to him.

By Mr. PERRY:

Q. It was charged in the amended bill, was it not, Mr. King, that the sale of the leasehold interest in the 7th Street property and also in 715 Market space had been made in bad faith. That was charged in the bill, was it not? A. It was charged in the bill; yes, sir.

Q. So your attention, when you answered the third amended bill, was specifically directed to the fact that there were these two leases which had been left by your father's estate, the one on the 7th Street property and the other on 715 Market space? A. There were two on the 7th Street property and one on 715 Market space.

Q. One on 715 Market space, and your attention was specifically directed to it? A. Yes, sir.

Q. So when you made answer to it, you made answer advisedly, did you not? A. Yes, sir.

Q. When you answered specifically, on page 2, as follows:

311 "The fixtures and paraphernalia of trade in the establishment conducted by the said deceased were of little or no value if removed therefrom, and these facts were well known to this defendant, as also the appraisers appointed by the said orphans' court, and the various merchandise creditors of the said estate; that the lease mentioned in said petition and referred to in said amended bill was at that time bearing a very large and expensive rental,"

What lease did you mean by that? A. I meant the leases for the properties.

Q. It is in the singular here. If that is a mistake of course I

have no objection to your correcting it. Did you mean all three leases? A. Yes, sir; the three leases.

Q. "That the leases mentioned in said petition and referred to in said amended bill was"—How is it you came to use a singular verb "was" if all three leases were referred to? A. As I said, I didn't draw that paper.

Q. Let us see. You meant to say that the three leases mentioned in said petition and referred to in said amended bill were at that time bearing a very expensive rental. You meant that, did you? A. Yes, sir.

Q. You go on and say:

"The various amounts due thereunder for rent, were overdue and unpaid, and the said lease was liable to forfeiture."

312 What did you mean by that language? A. I meant that the leases were liable to forfeiture; that the rent on 715 Market space had not been paid; there were two months' default in the rent of 814 7th street; there was one month's default in the rent of 812 7th street, which I have administration checks showing that the same was paid out.

Q. You proceed:

"And under the circumstances this respondent was of the opinion and still is of the opinion that the best thing which could have been done was to sell and dispose of the same at private sale in the manner that the said assets were disposed of; he further avers and says that it is untrue that the said lease could have been sold at a premium or bonus."

Now, when we turn to the language of the third amended bill, which I offer in this connection—I am offering the whole of both these papers, gentlemen, but in deference to Mr. Darlington's suggestion I am calling attention to the parts I consider specially applicable.

Mr. DARLINGTON: Just here, it is not understood that the certified copy of the amended bill is offered as evidence of the truth of anything contained in it?

Mr. PERRY: Oh, no; simply as to his statements.

By Mr. PERRY:

Q. Now when we turn to the language of the third amended bill, we find this:

"And on the same day the said Harry King, administrator as aforesaid, filed his petition in said court, alleging that said leasehold interests therein mentioned and described as belonging to the estate of the said Henry King, Jr. were valueless, and that said ap-

313 praisers had declined to place any value on them; and alleging further that he had received an offer of $3,500 from said Caroline King, the widow and sole devisee of the decedent, Henry King, Jr. for said appraised goods and leasehold interests, and, upon said petition obtained an order from said court authorizing him to

sell the same, provided the stock in trade and fixtures should not realize less than their appraised value, that thereupon the said Harry King, administrator as aforesaid, made a pretended sale of said stock and trade and fixtures and leasehold interests to said Caroline King for the sum of $3,500."

Then follow certain averments which it is not necessary to repeat here unless counsel on the other side want them. Then the language of the amended bill resumes as follows, at the bottom of page 3:

"Complainants are informed and believe, and, upon information and belief, aver that on the 25th of August, 1897, the said leasehold interests of the said Henry King, Jr. deceased, mentioned in the petition aforesaid, were then and still are of great value; that among said leasehold interests was a lease of premises known as 715 Market space which was then and now is worth at least $10,000, and could have been sold at that time for that amount, all of which was well known to the said Harry King and Caroline King" etc.

Then follows certain language which it is not necessary to detail here unless counsel desire it. Then at the bottom of page 4:

"And the complainants, upon information and belief, aver that the said defendant Harry King, some time during the month of November, 1898, was offered the sum of $10,000 for said lease
314 of said property No. 715 Market space, and said offer was refused by said Harry King, who demanded for himself and his codefendants the sum of $35,000 for the same."

That language that I read you was in this third amended bill.

Recurring again to your answer, you say, on page 2,

"He further avers and says that it is untrue that the said lease could have been sold at a premium or bonus; that the same, because of the rental payable thereunder were not salable and of no value, and that no purchaser therefor could have been found."

Now on page 3 again:

"He denies that the leasehold interests for premises knows as seven hundred and fifteen (715) Market space was on the twenty-fifth (25) day of August, A. D. 1897, or now is, worth at least ten thousand dollars ($10,000) and could have been sold or now can be sold for that amount."

And on page 5:

"Further answering he denies most emphatically that during the month of November, A. D. 1898, or at any other time was this defendant offered the sum of ten thousand dollars ($10,000) for the lease of said premises seven hundred and fifteen (715) Market space, or that said offer was refused by him, or that he demanded for himself and his co-defendant the sum of thirty-five thousand dollars ($35,000) for the same, or that he offered to sell the same; he denies that the said lease can now be sold at any time during the current year, or could have at any time been sold for at least the sum of ten thousand dollars ($10,000), or any other sum whatsoever."

315 Now, recurring to the former part of your answer, on page 2, do you say that the language there related to all the leases and not to the lease on 715 Market space only. A. Read that for me again, please, Mr. Perry.

Q. I know the question is pretty long. A. You have asked me so much that I can't remember, and I want to answer specifically and definitely.

Q. What I want to know is this: On page 2 you say as follows: "That the lease mentioned in said petition and referred to in said amended bill was at that time bearing a very large and expensive rental; the various amounts due thereunder for rents were overdue and unpaid and the said lease was liable to forfeiture, and under the circumstances this respondent was of the opinion and still is of the opinion that the best thing which could have been done was to sell and dispose of the same at private sale in the manner that the said assets were disposed of; he further avers and says that it is untrue that the said lease could have been sold at a premium or bonus."

Now, calling your attention to that, I want to know whether you say now that the language which I have last read referred to anything more than 715 Market space? A. That language you have read there refers to 715 Market space, but a portion of that, the appraisers, when they were appraising the stock—I told them about the leases. They then asked me what rents were paid.

Mr. PERRY: This is all objected to as not responsive to the question, and as hearsay.

316 The WITNESS: I am answering the first part of that, Mr. Perry. When I informed them that the rents were $300 for one piece of property, $225 for another, and $200 for the other property, then they told me that the rents were so large that they would not place any value upon the leases. In answer to the other question, in reference to this lease being worth $10,000 at the time of the sale, that is untrue. The lease at that time had no value. If subsequent improvements and trade conditions have changed the property, that had nothing at all to do with 1897.

Q. Was there any mention made anywhere in these proceedings, in equity No. 19338, of any sums of money that had been offered for any of these other leases—these two other 7th Street leases? A. Not that I know of.

Mr. DARLINGTON: I object to that question as calling upon the witness to testify as to the condition of the records of a case. I object on the ground that the records themselves are the only competent evidence on that point.

By Mr. PERRY:

Q. Did you have in mind, before you made this answer to third amended bill any offers for the purchase of any of these leases except of 715 Market space? A. No, sir.

Q. And in point of fact no such offers had been made at that time? A. No, sir.

Mr. PERRY: I now offer in evidence the third amendment to the bill of complaint in the case of The Ohio National Bank of
317 Washington and The Second National Bank of Washington *vs.* Caroline King, *et al.*, in equity No. 19338, and the answer of the defendant Harry King thereto.

Said papers are filed herewith, marked H. K. Cross Ex. Nos. 2 and 3, and are as follows:—

318 EXHIBIT H. K., CROSS NO. 2.

Third Amendment to Bill of Complaint.

Filed June 24, 1901.

In the Supreme Court of the District of Columbia.

OHIO NATIONAL BANK OF WASHINGTON and The Second National Bank of Washington, Complainants,
vs.
CAROLINE KING ET AL., Defendants.
} In Equity. No. 19338.

The complainants, by leave of the court first had and obtained, amend their bill of complaint heretofore filed in this cause by inserting therein, in lieu of the 4th paragraph thereof as amended, the following averments, viz: That on the 23rd day of August, 1897 the defendant Caroline King, who was named as executrix in aforesaid will, renounced her right to act as such, and on the same day the defendant Harry King filed his petition in the supreme court of the District of Columbia holding a special term for orphans' court business for letters *cum testamento annexo* upon the estate of the decedent, Henry King, Junior, wherein he stated, among other things, that the decedent left among his assets a stock of goods worth not more than $8,000, owing to the goods being out of season, a balance in bank of about $2,000, household furniture and various securities worth not more than $5,000. On the day following, viz: the 24th day of August, 1897, letters of administration were issued to the said Harry King, and, on the following day, viz: August the 25th, 1897, he caused to be returned to said orphans' court an appraisement
319 by Smith Thompson, Jr., and Richard E. Barry, the two appraisers appointed by the court, wherein the said stock of goods were valued at only $2995.00, and the wagons, etc., used in connection with the business of the decedent at $320, and on the same day the said Harry King, administrator as aforesaid, filed his petition in said court, alleging that certain leasehold interests, therein mentioned and described as belonging to the estate of the said Harry

King Junior were valueless, and that said appraisers had declined to place any value on them; and alleging further that he had received an offer of $3,500 from said Caroline King, the widow and sole devisee of the decedent, Henry King, Junior, for said appraised goods and leasehold interests, and, upon said petition obtained an order from said court authorizing him to sell the same, provided the stock in trade and fixtures should not realize less than their appraised value, that thereupon the said Harry King, administrator as aforesaid, made a pretended sale of said stock and trade and fixtures and leasehold interests to said Caroline King for said sum of $3,500; but these complainants aver that said pretended sale was not made *bona fide* but made without notice to these complainants and the other creditors of the said decedent and with the intent, on the part of said Harry King and said Caroline King, to defraud the creditors of the estate of said Henry King Junior; that said appraisers were persons unfamiliar with the value of said goods, and accepted the statement of said Harry King and Caroline King as to the value of the same, and acted solely upon said statements in making the appraisement, while, in truth and in fact, as your complainants are informed and believe, the said goods were worth not less than $25,000, and were at the time of
320 said pretended sale to the knowledge of said Harry King and Caroline King insured against loss by fire to the amount of $25,000; that the statements made by said Harry King in aforesaid petition "that said appraisers had refused to place any value upon said leas-hold interests, and that the same were valueless" were false and untrue to the knowledge of the said Harry King; that said appraisers were not requested by said Harry King, or any other person or persons, to appraise the leasehold interests, and said defendant Harry King and said defendant Caroline King well knew when the said petition was filed by said Harry King, as administrator as aforesaid, and when said sale of said stock, trade, fixtures and leasehold interests of said Henry King, Junior, deceased, was made to said Caroline King, as aforesaid, that said appraisers had not been requested to appraise said leasehold interests, and, for that reason only and for no other, there had been no appraisements of said leasehold interests made; that the statements in said petition "that said leasehold interests were of no value" were also untrue, and were made for the purpose of concealing the true value of the personal estate possessed by the said Henry King, Junior, deceased and in the hands of the said Harry King, as administrator as aforesaid, and for the purpose of deceiving and defrauding the creditors of the said Henry King Junior, deceased, and among them, these complainants, in order that the real value of the said leasehold interests and the proceeds of the same might be applied to the use and benefit of him and of Caroline King. Complainants are informed and believe, and upon information and belief, aver that on the 25th of August,
1897, the said leasehold interests of the said Henry King,
321 Junior, deceased, mentioned in the petition aforesaid, were then and still are of great value; that among said leasehold

interests was a lease of premises known as 715 Market space, which was then and now is worth at least $10,000, and could have been sold at that time for that amount, all of which was well known to the said Harry King and Caroline King; that the said Harry King was at the time of the death of his father associated with him in the management of a drygoods business, conducted at said premises known as No. 715 Market space; that after the death of the said Henry King, Junior said business was continued by the said Caroline King, the defendant Harry King continuing as the manager thereof; that during the month of January, 1898, the said business, though still conducted under the name of Henry King, Junior, was owned by co-partnership, consisting of the defendants Harry King, Joseph King and Abraham King, all sons of said Henry King, Junior and Caroline King, which said partnership was formed during said month. The complainants aver and charge that the defendant Harry King at the time of the transfer to the said Caroline King of the lease of said property and the pretended sale of said goods, made said transfer and sale in contemplation of becoming associated as a copartner of the defendant Caroline King, and with the view to continuing the business of the said Henry King Junior for the gain and profit of himself, his mother and brothers, and to defraud the creditors of the said Henry King Junior of said stock of goods and leasehold interests; that said inventory, appraisement and pretended sale and the steps that preceded the same were all parts of a collusive scheme of the said Harry and Caroline King to defraud the creditors of the said Henry King Junior by transferring said goods
322 and leasehold interests to said Caroline King for a sum much less than their true value; that all of said stock in trade has been disposed of by the defendants Harry King and Caroline King, and the proceeds converted to their own use; and the complainants, upon information and belief, aver that the said defendant Harry King, some time during the month of November 1898, was offered the sum of $10,000 for said lease of said property No. 715 Market space, and said offer was refused by said Henry King, who demanded for himself and his co-defendants the sum of $35,000 for the same; and the complainants further aver, upon information and belief, that the said lease of property No. 715 Market space can be sold now, at any time during the current year for at least the sum of $10,000 but they aver that such sum, if realized from such sale, would be wholly insufficient and inadequate to pay off all the debts and liabilities of said Henry King, deceased; that the said Harry King has wholly refused to pay any part of the aforesaid indebtedness due to complainants, or to render unto them any account of the personal estate in his hands, notwithstanding he has been often requested so to do.

And by further amending said bill by inserting, in lieu of the prayer added to said bill by the former amendment thereof, said insertion to be made between the 3rd and 4th prayers of the original bill, the following prayers to be numbered:

1st. "A." That the said pretended sale of said goods and
323 merchandise to said Caroline King be adjudged fraudulent and void as against the creditors of said decedent, and that said Harry King and said Caroline King be decreed to pay into court to the credit of the estate of said Henry King Junior the fair market value of said goods and chattels at the time of the said sale thereof to said Caroline King, and that said sale of said leasehold interests may also be set aside, vacated and declared fraudulent, null and void as against the creditors of said decedent; and that the trustee or trustees may be appointed to sell the same and the proceeds of said sale be held subject to the order of this court.

2nd. "A." That the defendant Caroline King been joined pending this suit from in any way assigning, transferring or otherwise disposing of said lease of said premises No. 715 Market space, except by order of this court.

3rd. "A." That an account may be taken, under the directions of this court, of the debts due your complainants and of all other debts which were owing by the said decedent at the time of his death, and which remained unpaid, and, also of the personal estate of the said decedent and of whatever may be obtained by virtue of the sale of said leasehold interests and what may be decreed to be paid by the said Harry King and said Caroline King, on account of the said goods and chattels, and that said personal estate may be applied in the course of administration in payment of the debts of the decedent due to your complainants and all other creditors who may come in and contribute to the expenses of this suit.

THE OHIO NATIONAL BANK OF WASHINGTON,
By WORTHINGTON, HEALD & FRAILEY, *Its Sol'rs.*
THE SECOND NATIONAL BANK OF WASHINGTON,
By JOHN C. ECKLOFF, *Cashier.*

324 DISTRICT OF COLUMBIA, *To wit:*

I, John C. Eckloff, do solemnly swear, that I am and for over eight years past have been the cashier of the plaintiff, The Second National Bank of Washington; that I have read the aforegoing amendment to the bill of complaint in this cause and know the contents thereof, and that the facts therein stated as of my personal knowledge are true and those stated upon information and belief I believe to be true.

JOHN C. ECKLOFF.

Subscribed and sworn to before me this 18th. day of June, A. D. 1901.

WM. S. TORBERT,
Notary Public, D. C.

[NOTARIAL SEAL.]

A true copy.
Test:

J. R. YOUNG, *Clerk*,
By M. A. CLANCY, *Ass't Clerk.*

[SEAL.]

325 EXHIBIT H. K., CROSS EX. No. 3.

Answer of Harry King.

Filed Aug. 13, 1901.

In the Supreme Court of the District of Columbia.

THE OHIO NATIONAL BANK OF WASHINGTON *et al.*
vs.
CAROLINE KING ET AL.
} No. 19338. Equity.

Answer of the defendant Harry King, administrator *c. t. a.*, to the amended bill filed herein June 24, 1901.

This defendant by protestation, not confessing nor admitting as true any or all of the various matters or things set forth in the said amended bill as the same are therein averred, for answer to such parts thereof as he is advised it is necessary and material for him to answer, makes answer and says:

1. He admits that the said defendant Caroline King renounced her nomination as executrix under the will of said Henry King, Jr., and that the proceeding set forth in said paragraph with respect to the issuing letters of administration to this defendant and the appointment of appraisers were had; he admits filing the petition referred to in said amended bill, but for greater certainty as to the averment therein he refers thereto, and further answering he
326 says that it is true that by authority of the orders passed in said cause he made sale of the stock in trade, fixtures and leaseholds referred to in said petition to the said Caroline King for the sum of thirty-five hundred dollars ($3,500.00); he denies, however, that the said sale was a pretended sale and was not made in good faith; he denies that the said sale was made with intent to defraud the creditors of the estate of the said Henry King Jr.,: he says that at the time of the death of his father the stock in trade belonging to his estate and referred to in said petition consisted of a broken stock of odds and ends and remnants of the season's business upon which not more than ten per cent. of the original cost value, if that,

could have been realized if the sale thereof had been made at public auction; or forced sale.

The fixtures and paraphernalia of trade in the establishment conducted by the said deceased were of little or no value if removed therefrom, and these facts were well known to this defendant, as also the appraisers appointed by the said orphans' court, and the various merchandise creditors of the said estate; that the lease mentioned in said petition and referred to in said amended bill was at that time bearing a very large and expensive rental; the various amounts due thereunder for rent, were overdue and unpaid and the said lease was liable to forfeiture, and under the circumstances this respondent was of the opinion and still is of the opinion that the best thing which could have been done was to sell and dispose of the same at private sale in the manner that the said assets were disposed of; he further avers and says that it is untrue that the said lease
327 could have been sold at a premium or bonus; that the same, because of the rental payable thereunder were not saleable, and of no value, and that no purchaser therefor could have been found; he denies that the appraisers appointed by the orphans' court were persons unfamiliar with the value of the said goods and that they accepted the statement of this defendant and his co-defendant Caroline King as to the value of the same and acted solely upon said statements in making their appraisements; he denies that the said goods were not worth less than twenty-five thousand dollars ($25,000.00) but on the contrary says they were worth no more, if as much, as they were appraised for. As to the allegation in said amended bill as to the amount of insurance carried by the said Henry King, Jr., this defendant says that said amount, to wit, twenty five thousand dollars ($25,000) was carried at all times by his father for the purpose of covering the stock on hand during the fall and active business season of the year; that when said establishment had its full complement of stock no greater amount of insurance was carried; he avers that it is true that the said appraisers had refused to place any value upon the said leasehold interests and that it is true that they considered the same valueless; he says he did request the said appraisers to appraise the said leasehold interests, and that they informed him that they did not consider them of any value; he says that it is untrue that when he filed his said petition asking for the sale of the said stock, fixtures and leasehold that said appraisers had not been requested to appraise said leasehold interests but as aforesaid, they were so requested and refused, as stated
328 in his said petition; he denies that the statements made in his petition were made for the purpose of concealing the true value of the personal estate possessed by his father, or for the purpose of deceiving and defrauding the creditors of said estate or for any fraudulent purpose. Further answering he denies that on the twenty-fifth (25) day of August, A. D. 1897, or that within any reasonable time thereafter the said leasehold interests were or that they now are of great value, or of any value whatsoever; he denies

that the leasehold interest for premises known as seven hundred and fifteen (715) Market space was on the twenty-fifth (25) day of August, A. D. 1897, or now is, worth at least ten thousand dollars ($10,000.00) and could have been sold, or now can be sold for that amount; he avers and says that with respect to said leasehold interests, that at the time he took upon himself the administration of his father's estate the neighborhood of said premises seven hundred and fifteen (715) Market space had greatly depreciated for business purposes, and that it is only within the last two years that it has again become useful and a fair stand for business purposes; that the rental for said premises is far beyond the rental produced by adjoining and neighboring properties of larger space and better improvements; he denies that at the time of the death of his father he was associated with him in the management of a dry goods or other business conducted in said premises seven hundred and fifteen (715) Market space, this defendant had no interest and was not employed therein; he admits that after the death of the said Henry King, Jr., and after the purchase by said Caroline King, the said business was
329 carried on by her and that he assisted his mother the said Caroline in the management thereof; this, he says, was not a continuance of any managership thereof, because, as he says, he had never been manager of said business; he admits that in February, 1898, the said business was conducted by the co-partnership consisting of the defendant, the said Caroline, Joseph and Abraham King; he denies, however, that he sold said goods to said Caroline King and transferred to her the lease for said premises in contemplation of his becoming associated as a co-partner of the said Caroline, and with a view of continuing the business of the said Henry King, Jr., for the gain and profit of himself, his mother and brothers, and to defraud the creditors of said estate of said stock of goods and leasehold interests; he denies that the filing of said inventory and the making of said appraisement and sale and the steps that preceded the same were parts of a collusive scheme entered into by this defendant and the said Caroline, or anyone else to defraud the creditors of the said Henry King, Jr., in any manner whatsoever; he admits that the stock in trade purchased of the said Caroline King has been disposed of, it was disposed of in the ordinary course of business by the said Caroline, but only by means of placing in said establishment a new and complete stock and then disposed of in the ordinary course of business. Further answering he denies most emphatically that during the month of November, A. D. 1898, or at any other time was this defendant offered the sum of ten thousand dollars ($10,000.00) for the lease of said premises seven hundred and fifteen (715) Market space, or that said offer was refused by him, or that he demanded for himself and his codefendant the sum of thirty-five
330 thousand dollars ($35,000) for the same or that he offered to sell the same; he denies that the said lease can now be sold at any time during the current year, or could have at any time been sold for at least the sum of ten thousand dollars ($10,000.00),

or any other sum whatsoever; he denies that he has wholly refused to pay any part of the indebtedness due complainants or to render unto them any account of the personal estate in his hands, and further, he denies that he was requested so to do; he avers and says that the reason that his final accounts have not been closed is because of the fact that pending these proceedings receivers were appointed by this honorable court to take charge of the valuable real estate belonging to said deceased, and that the intention has been to settle the said estate by one accounting covering both the real and personal estate belonging to the said Henry King, Jr.

And this defendant denies all and all manner of unlawful combination and confederacy wherewith he is by the said amended bill charged, without this, that there is any other matter, cause or thing in the complainant's amended bill contained that it is material or necessary for this defendant to make answer to, and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided, or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct; and humbly prays to be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

And this defendant further says that the said complainants have not in and by their said amended bill made or stated such a
331 case as entitles them to the relief they seek or to any relief whatsoever, and he claims the same benefit of this objection as though he had specifically demurred to the said bill because thereof.

HARRY KING,
Adm'r c. t. a.

I, Harry King, on my oath do depose and say that I have heard read the foregoing answer by me subscribed and know the contents thereof; that the statements therein made from my personal knowledge are true and those stated upon information and belief, I believe to be true.

HARRY KING.

Subscribed and sworn to before me this twelfth day of August A. D. 1901.

[NOTARIAL SEAL.] JOHN SHRIVENER,
Notary Public, D. C.

332 By Mr. PERRY:

Q. How is it possible, Mr. King, that your attention having been so pointedly directed to 715 Market space in this equity proceeding, you could have made the mistake here you did make the other day which you say you have corrected this morning? How is it possible you could have done that? A. It was in this way, Mr. Perry. In gathering up the checks for this case, we hunted all the checks that

we possibly could find, and all the letters. Among them I found a check dated August 11th, payable to Mrs. Kennedy. At the time I testified last I had forgotten the circumstances of that, but on going back and thinking the matter over and looking into my administration book, I found that my testimony that I gave in my amended bill was correct.

Mr. DARLINGTON: You mean your answer?

A. My answer to the amended bill. I am not very well versed in litigation. This is the first litigation I ever was in and of course I don't know the legal phrases or terms. On August 30th I found in my administration account where there was a check that had been paid for the account of the rent of Mrs. M. A. B. Kennedy. At the time I gave my answer to the amended bill, it was fresh in my memory. I had gone over the matters. A long time has elapsed since then, and I could not remember it exactly; but since looking at that check, the whole thing has been called to my mind, and I notice that the check of August 11th,—and which I have since found out from the bank—was not paid. Therefore the answer that I gave to the amended bill must be correct, because the rent was overdue.

333 By Mr. JOHNSON:

Q. Mr. King, do you remember whether the practice was to pay the rent in advance or not? A. In advance, sir.

Q. It was paid in advance? A. Yes, sir; the rent was paid in advance.

Q. Always? A. Always, to the best of my knowledge. It was always paid in advance.

Q. I mean in your father's lifetime? A. In my father's lifetime, sir.

Q. And was it paid on the first day of the month or the last day of the month usually? A. Sometimes on the last day, sometimes on the first day, sometimes a short time after.

Q. As I understand you now, your position is that at the time of the transfer of this lease, the rent on Mrs. Kennedy's property was in arrear, and the lease liable to forfeiture on that ground. A. At the time of my petition to the court, the rent was in arrears.

Q. And the answer that you filed in the Ohio National Bank suit did refer in that statement to Mrs. Kennedy's property? A. Part of it did and part of it should have applied to the other property.

Q. The statement that the rent was in arrear and the lease was liable to forfeiture did apply to that property? A. It applied to that property and to the other two properties, too.

334 Q. But it applied to that? A. If it applied to one, it applied to the other.

Q. In your statement the other day that it did not apply to that, but only to the 7th Street property, you were mistaken? A. Yes, sir; as I have explained.

Q. That is your position now? A. Yes, sir; and there are the checks to prove the explanation.

Q. At the time the petition was filed, the rent had not been paid? A. No, sir; it had not.

Q. I mean the petition for sale? A. No, sir. I would like to say, Mr. Perry, that in case those checks——

Mr. PERRY: Mr. Johnson is cross examining you. You do not need to appeal to me.

The WITNESS: I would like to say, Mr. Johnson, that in case those checks are offered in evidence, my administration checks, they be kept intact, because that is a matter for the court to pass on. I want to keep my files correct. That is all.

Mr. DARLINGTON: If counsel will agree, we will have these administration checks copied in the record with their endorsements and have the originals returned to Mr. King, subject to be called for at the hearing, if any of the parties desire it. Is that satisfactory to you, Mr. Perry?

Mr. PERRY: Perfectly so.

Mr. DARLINGTON: And to you, Mr. Johnson?

Mr. JOHNSON: Yes.

335 By Mr. JOHNSON:

Q. I want to see if I am right in my understanding of your position. Your present understanding is that at the time you filed your petition in the orphans' court, asking for the right to sell the lease, the rent of Mrs. Kennedy's property was in arrear. Is that right? A. That is correct, sir.

Q. How many months? A. Only for the month of August, on account of the check being returned to Mrs. Kennedy, on account of my father's death. The bank would not pay any money out after my father's death, and this check came to the bank after my father died. It was sent to her on the 11th and my father died on a Sunday, on the 15th of August and the check came in afterwards. The protest notice was served on the 23rd or 24th, I can't remember exactly.

Q. The July rent had been paid? A. Yes, sir; the July rent had been paid.

Q. And when you filed an answer to the Ohio Bank's third amended bill, and spoke of rent in arrear, you had reference to the month of August? for Mrs. Kennedy's property? A. I had reference to the rent for the month of August for Mrs. Kennedy's property and reference to the rent for July and August for 814 7th street and the rent for the month of August for 812 7th street.

Q. I am confining myself to Mrs. Kennedy's property. I have no interest in the other. Q. But I want to give you, Mr. Johnson, what the petition was to the best of my knowledge.

336 Q. I say, confining yourself to Mrs. Kennedy's property the rent that was in arrear to which you referred in your answer then was for the month of August? A. Her part of it was for the month of August; yes, sir.

Q. When was it you got the money from Mr. Stoll? A. I got the

money from Mr. Stoll, to the best of my knowledge, about a day before my administration account was opened.

Q. When was that? A. Somewhere about the 26th.

Q. Then you would have gotten it about the 25th? A. No; I got it about the 26th.

Q. I say the money. A. I didn't say Monday. I said the 26th, sir. I don't know whether the 26th fell on Monday or what day it fell.

Q. The administration account, then, was opened on the 27th, was it? A. The administration account was opened on the 27th I think; yes, sir.

Q. You got the money from Mr. Stoll the day previous? A. Yes.

Q. In cash? A. As I stated before, I don't remember whether Mr. Stoll gave me a check or whether we got the cash and deposited it in the Bank of the Republic, or whether a check was made out and sent to Mrs. Kennedy. I am not clear on that point.

337 Q. Is this right: That you either got the money in cash from Mr. Stoll and paid it into Mrs. Kennedy's account at the bank, or you got Mr. Stoll's check and sent that to her. A. No; Mr. Stoll would have given me a check at any event, and the check would have been deposited to Mrs. Kennedy's credit at the National Bank of the Republic, or it may have been sent to her. That I can't remember exactly.

Q. Then one of two things: Either you took Mr. Stoll's check for the amount of the rent due her and deposited that check to her credit in the bank, or you sent it to her? A. Yes, sir.

Q. One or the other? A. One or the other. I think that is my recollection of the matter as it stood.

Q. Then after your account was opened, you gave Mr. Stoll the check to reimburse him for the check he had given you? A. Several days later.

Q. Is that right? A. I gave him a check; yes, sir. There is the check right there (indicating).

Q. That was the whole transaction? A. Yes, sir; that was the entire transaction.

Q. What was Mr. Stoll's business? A. Mr. Stoll was in the shoe business.

Q. Where was his place of business? A. His place of business was 810 7th street.

Q. 810? A. 810 7th street, adjoining our place.

338 Q. Do you remember who owned that property? A. H. King, Jr.

Q. He was a tenant, then, of your father? A. Yes, sir.

Q. What was he manager of? A. Of the shoe department; the shoe store.

Q. Whose shoe store? A. I think he was running the shoe store for Batchell & Lincoln of Boston.

Q. What was Mr. Stoll's rent; what rent did he pay at that time? A. I couldn't exactly tell you, Mr. Johnson. I can't remember.

Q. Have you any idea? A. I can't remember whether he paid at that time $175 or whether he paid $200. I couldn't say. I think he paid more.

Q. Was that a separate building from the building in which your father's business was conducted, or was it under the same roof? A. It was a separate building. At one time we had a connection in the rear part of the store, about a 6 foot opening in order to help him to get whatever trade would come into our store, would go into his; but subsequently that was closed up by a fire door.

Q. Did he occupy all the floors of the building? A. He occupied the first and second floors of his building; yes, sir. We didn't occupy any portion of it at all. I don't want to be put down on record as making an accurate statement of that rent, Mr. Johnson—$175 or $200. It may have been $225.

339

Q. You mean Mr. Stoll's rent? A. Mr. Stoll's rent. I do not want to be put down as saying accurately it was $175 or $200. It may have been $225. I couldn't tell you without reference.

Re-direct examination.

By Mr. DARLINGTON:

Q. Mr. King, there seems to be a suggestion in the cross-examination that you misrepresented the length of the term of this lease of No. 715 Market space. Please look at the paper I now hand you and state what that paper is. A. That is the lease of 715 Market space.

Q. Is that the original paper? A. That is the original paper, sir.

Mr. DARLINGTON: I would prefer not to file this, but I will if it is desired. I offer it for the purpose of showing that whereas the last extension was made October 8th, 1896, the lease, extensions and all, was recorded October 17, 1896.

Mr. JOHNSON: You merely want to offer the date of its record?

Mr. DARLINGTON: Yes; and the fact that it was recorded.

Mr. JOHNSON: I suppose we can admit that. You do not claim there is any difference between that and the one in the printed record?

Mr. PERRY: It is stated in the record, is it not, when it was filed?

Mr. DARLINGTON: It may be.

340 By Mr. DARLINGTON:

Q. Do you recall why the last check given in your father's life time was given as late as August 11th? A. Yes; we wanted to pay Mrs. Kennedy her rent.

Q. The question is why it was as late as August 11th, instead of August 1st. A. My father was very, very sick, and of course we had our hands full attending to him. We were all very much worried,

and possibly it may have slipped up a few days over the regular time.

Q. Referring to your answer to the third amended bill I invite your attention to this phraseology:

"The various amounts due thereunder for rent were overdue and unpaid."

What various amounts are there referred to? A. They refer to the 814 7th Street store, on which there was two months' rent due, amounting to $400; the 812 7th Street store, on which there was one month's rent due, amounting to $300; and the 715 Market Space store, on which there was one month's rent due, amounting to $200.

Q. In answer to one question propounded to you by Mr. Perry, you said that a certain part of this answer referred to premises No. 715 Market space. I will ask you to take the answer and read into the record whatever there is in it which refers exclusively to 715 Market space. Just look over it and read everything that refers to 715 Market space exclusively. A. The part here where it says that it is untrue that the lease could have been sold at a premium or a bonus, refers to 715 Market space.

341 Q. Before you read that, I call your attention to the language of the third amendment of the bill, (page 3,) claiming that "The said leasehold interests of said Henry King Junior deceased were then and still are of great value," and ask you whether the part of your answer you refer to applied to only one of those leases or all of them? A. I can't quite understand that question, Mr. Darlington.

Q. Calling your attention to the fact that the third amended bill claims that all these leases could have been sold for a bonus, I ask you if you mean to state that your denial in the answer that the lease could have been sold for a bonus applies only to the lease of 715 Market space? A. There were not any of the leases that at that time could have been sold for a bonus.

Q. Please take the answer and read it carefully, and read into the record the parts of it that apply only, or were intended to apply only to 715 Market space? A. I can't quite catch that question.

Q. I want you to read that answer and read into the record every part of it which relates only to 715 Market space.

Mr. PERRY: Mr. Perry objects to this, on the ground that the witness has already been interrogated about it and has answered, and so far as the language of the answer is concerned, it speaks for itself.

The WITNESS: This is not my answer, Mr. Darlington. Oh, yes, it is. There have been so many that I did not recognize it. (After reading:) This part here, beginning on page 3, refers to 715

342 Market space:

"Further answering he denies that on the twenty-fifth (25) day of August, A. D. 1897, or that in any reasonable time thereafter the said leasehold interests were or that they now are of great value, or of any value, whatsoever; he denies that the leasehold interests

for premises known as seven hundred and fifteen (715) Market space was on the twenty-fifth (25) day of August, A. D. 1897, or now is, worth at least ten thousand dollars ($10,000) and could have been sold or now can be sold for that amount; he avers and says that with respect to said leasehold interests, that at the time he took upon himself the administration of his father's estate the neighborhood of said premises seven hundred and fifteen (715) Market space had greatly depreciated for business purposes, and that it is only within the last two years that it has again become useful and a fair stand for business purposes; that the rental for said premises is far beyond the rental produced by adjoining and neighboring properties of larger space and better improvements; he denies that at the time of the death of his father he was associated with him in the management of a dry goods or other business conducted in said premises seven hundred and fifteen (715) Market space, this defendant had no interest and was not employed therein."

Q. Since our former session, have you been able to find a check by which the taxes due in the fall of 1892 were paid? A. Yes, sir; I found one check of $140, payable to the order of M. A. B. Kennedy, dated November 11, 1892, signed by my father.

343 Q. In whose handwriting is the endorsement on the back of that check? A. The endorsement is in the handwriting of Mrs. M. A. B. Kennedy.

Mr. DARLINGTON: We offer that check in evidence.

Said check is filed herewith, marked H. K. Re-dir. No. 1, and is as follows:

H. K. RE-DIR. No. 1.

No. 1370. WASHINGTON, D. C., *Nov. 11th*, 1892.

Lincoln National Bank of Washington, D. C.,

Pay to the order of M. A. B. Kennedy one hundred and forty 00/100 dollars.

$140.00/100 H. KING, JR.

Endorsed: M. A. B. Kennedy. For deposit only credit account Swormstedt & Bradley. Nat'l Bank of the Republic Nov. 17 1892 Washington, D. C."

The WITNESS: There is still another one. We are searching for it but have not been able to find it.

By Mr. DARLINGTON:

Q. At our last session Mr. Johnson asked you to ascertain and inform him whether you had paid any other taxes in the spring of 1900 in connection with the estate property or your receivership. A. Yes, sir.

Q. Have you made that examination? A. I have made an examination. We find that the receiver paid taxes from February up to July, inclusive.

344 Q. How many bills? A. About thirty tax bills, amounting to about $3300—somewhere around there.

HARRY KING.

Subscribed and sworn to before me this 6th. day of June 1904.

JOHN W. HULSE,
Examiner in Chancery.

At this point a recess was taken, and the taking of these depositions was resumed at the office of the recorder of deeds of the District of Columbia, at the city hall.

345 GEORGE FREDERICK SCHAYER, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. TOBRINER:

Q. Please state your name in full. A. George Frederick Schayer.

Q. Your residence and occupation? A. Washington, D. C.; deputy recorder of deeds.

Q. How long have you been deputy recorder of deeds for the District of Columbia? A. Thirty odd years.

Q. Colonel, can you tell us where the record of sales made by the collector of taxes of the District of Columbia from April 12th to April 19th, 1899 is in this office? A. I will have to refer to the record. I do not remember the books. They can easily be seen.

Q. Where is that record? A. The tax sale for the year 1899 was recorded May 9, 1899 in Libers 2391, 2419 and 2436 of this office.

Q. Can you state when it was recorded? A. May 9th, 1899, it was committed to record.

Q. Where is the original? Is that the only record you have in this office of that tax sale? A. Yes. The original is not here. The original was delivered back to the collector.

Q. When was the original returned to the collector of taxes? A. I do not remember. I suppose I can tell by reference to the books. I do not find the exact date.

346 Mr. JOHNSON: Look at this, Colonel.

A. 4/5/00. That means April 5, 1900. It ought to be entered here. I find all the others.

Q. What time does the record show that the report was returned to the collector of taxes? A. The 5th of April, 1900.

Q. Are we to understand then that there is not now and has not been since April 5, 1900 any report of the tax sale held April 12 to April 19, 1899 filed in this office? A. No other tax sale record?

Q. Yes. A. Certainly; every year there is a report.

Q. Are we to understand that of the tax sale from April 12 to April 19th, 1899 there is not now nor has there been since the 5th day of April 1900 any report in this office? A. In relation to that particular tax sale?

Q. Yes. A. No; none whatever.

Q. Can you turn to the liber and folio upon which this report begins? If you will turn to Liber 2391, folio 411, I think that is the beginning? A. Yes; that is the beginning.

Q. That is the first page upon which the report of the collector of taxes for these sales appears? A. Yes.

Mr. TOBRINER: We offer in evideuce that first page, and I presume it will be agreed that it shall be copied into the record.

Mr. JOHNSON: That a copy may be substituted for the original; but I object to that as incompetent; not to the copy, but to
347 that.

Mr. TOBRINER: We offer it in evidence and a copy of that record will be substituted for the original.

Mr. DARLINGTON: And we agree that the original itself may be produced at any hearing before the court, subject to all objections to its competency.

Mr. JOHNSON: Certainly.

The page referred to is as follows:

348 411

their act and deed. Given under my hand and official seal this 9th. day of May, A. D. 1899.

H. R. HOWENSTEIN,
Notary Public.

[NOTARIAL SEAL.]

Ex.

Del'd to collector of taxes 4–*S*–1900.

Report of Tax Sales, 1899.

Recorded May 9th, 1899, 2.50 p. m. (51.)

OFFICE OF THE COMMISSIONERS
DISTRICT OF COLUMBIA,
WASHINGTON, *May 5th*, 1899.

We hereby certify that the following exhibit is a true statement of sales of property to individuals at the tax sale, April 12, to 19 (inclusive) 1899.

All other property delinquent and sold at said sale was bid in by and in the name of the District of Columbia.

JOHN B. WIGHT,
JOHN W. ROSS,
LANSING H. BEACH,
Commissioners of District of Columbia.

Washington city pages 1 to 810 inclusive parts 1 to 40
County nonagricultural pages 1 to 297 inclusive parts 1 to 15.
County agricultural " 1 to 48 " " 1 and 2

E. G. DAVIS,
Collector of Taxes, D. C.

Witness:
WILLIAM TINDALL.

349 By Mr. TOBRINER:

Q. Up to what page does the record of that sale extend in this Liber 2391? A. It extends to page 497.

Q. What is the last piece of property mentioned as being sold in this liber at page 496. A. The last entry is plat 30, subdivision Giesboro road, acres 16 and improvements. To whom assessed: Kennedy, Margaret." Of course it means Margaret Kennedy.

Q. Of what do the entries in this book consist, agricultural or city property? A. What is that number?

Q. 2391. A. It is county—agricultural.

Q. Exclusively? A. I don't remember. I can't remember these things.

Q. That is the reason we want you to look. A. That is four years ago. (After examining memorandum:) Yes; exclusively, in 2391.

Q. Does this liber contain any reference to any other liber in which the tax sales report is continued? A. I don't know.

Q. Look and see. A. It doesn't seem to. It is the end of it, very likely. It does not give any reference to the city tax sales; but then the reference book kept by the office shows the books in which the tax sale of May 9, 1899 is recorded.

Mr. TOBRINER: We offer in evidence pages 496 and 497, the last pages of Liber 2391, and it will be stipulated and agreed
350 that a copy of the pages may be substituted in place of the book.

Mr. JOHNSON: Subject to all objections that would apply to the book?

Mr. DARLINGTON: The book itself will be produced at the hearing if desired.

The pages referred to are as follows:

351 496. *Real Estate Tax Sale, District of Columbia, April 12 to 19, Incl., 1899.*

Date.	Property sold.	Items of sale.	Amount sold for.	Purchaser.
April 19	Plat 30: Sub Bellevue, lot 10. Acres 34.20. .... To whom assessed, Burgdorf, Aug. & oth.	All tax for year 1898. Penalty..... Advertising..... Total.....	23 94 3 35 1 20 $28 49	Thos. W. Smith. Do.
	Plat 30: Sub Bellevue, lot 11. Acres 1..... To whom assessed, Burgdorf, Aug. & oth.	All tax for year 1898. Penalty..... Advertising..... Total.....	60 08 1 20 $1 88	Thos. W. Smith.
	Plat 30: Sub Bellevue..... Acres 19 & imp..... To whom assessed, Gates, John H.	All tax for year 1898. Penalty..... Advertising..... Total.....	12 40 1 74 1 20 $15 34	Do.
	Plat 30: Sub Bellevue, lot 8. Acres 15 75/& imp. To whom assessed, Harrison, Wm. A.	All tax for year 1898. Penalty..... Advertising. ..... Total.....	14 03 1 9[illegible] 1 20 $17 19	Do.
	Plat 30: Sub Giesboro road.. Acres 16 & imp..... To whom assessed, Kenmdy, Margaret.	All tax for year 1898. Penalty..... Advertising..... Total.....	12 00 1 68 1 20 $14 88	C. H. Wiltsie.

352 By Mr. TORRINER:

Q. Can you tell us, Colonel, in what other book the report of this tax sale held April 12th to April 19th appears? A. Yes, sir; I can tell by reference to the list. It is also recorded in 2419 and 2436 of the land records of this District.

Q. Turn to Liber 2419 and tell us on what page of that liber this report appears? A. It appears on page 1 and goes through the whole book to page 501.

Q. State what there is in that liber which identifies it with the sale of taxes from April 12th to April 19th, 1899. A. What identifies it? Well, just the very heading of it, you know.

Q. The heading? A. Yes.

Q. What, if anything, appears on page 1? A. "Tax sales, District of Columbia, April 12th to 19th inclusive, 1899," it says on top of the record page.

Q. Is there anything in that page or in that liber which refers to any other portion of the report of the tax sales had at that time? A. What portion? Any other portion except city property?

Q. No; is there anything in this liber which refers to the report of those tax sales as recorded in any other liber? A. No, sir.

Q. Will you look at page 222 of this liber and state
353 whether it refers to sub-lot A in square 432? A. It does.

Mr. TOBRINER: We offer in evidence page No. 1, page No. 222 and the last page of this liber, page 501; and it is stipulated and agreed that copies of the pages shall be substituted in place of the originals and used at the trial, and that the original books may be used if considered necessary to either of the parties.

Mr. JOHNSON: All this is subject to my objection.

The three pages referred to are as follows:

354 Del'd to col. of taxes 4-5-1900.

Real Estate Tax Sale, District of Columbia, April 12 to 19, Incl., 1899.

Date.	Property sold.	Items of sale.	Amount sold for.	Purchaser.
April 12	Square 1: Lot of 22 & imps... To whom assessed, Judith Daly.	All tax for year 1895. Penalty..... Advertising.....	11 25 1 59 1 20	C. H. Wiltsie, 818 Powers bldg., Rochester, N. Y.
		Total.....	$14 04	
	Square 1:	All tax for year 1898. Penalty.....	33 53 4 59	Do.
		Watermain tax: 3rd. inst..... Inst. from Aug. 1/95. Assessment for alley grading..... Interest from M'ch 17/94..... Advertising.....	11 27 4 12 2 00 1 01 1 20	
		Total.....	$57 82	
	Square 1: Lot of 16 & imps... To whom assessed, Daniel Hannan, trust.	All tax for year 1898. Penalty..... Advertising.....	17 27 2 42 1 20	Do.
		Total.....	$20 89	
	Square 1: Lot 4..... To whom assessed, William Smith.	All tax for year 1898. Penalty..... Advertising.....	15 18 2 13 1 20	Do.
		Total.....	$18 51	
	Sq. 4: Lot sub. 24 & imp.. To whom assessed, Fannie Green.	All tax for year 1898. Penalty..... Advertising.....	36 23 5 07 1 20	Do.
		Total.....	$42 50	

355 222. *Real Estate Tax Sale, District of Columbia, April 12 to 19, 1899.*

Date.	Property sold.	Items of sale.	Amount sold for.	Purchaser.
April 13	Square 431: Lot 4 & imp..... To whom assessed, Patrick Kavanaigh.	2 half tax for year 1898.....	179 16	C. H. Wiltsie.
		Penalty	19 71	
		Advertising	1 20	
		Total	$200 07	
	Square 432: Sub lot A & imp... Maria T. Gillis To whom assessed	2 half tax for year 1898.....	128 50	Do.
		Penalty	14 13	
		Advertising.....	1 20	
		Total.....	$143 83	
	Square 435: Sub lot 22 & imp... To whom assessed, James W. Barker.	All tax for year 1898.	56 25	Do.
		Penalty	7 88	
		Advertising.....	1 20	
		Total.....	$65 33	
	Square 435: Sub lot 23 & imp .. To whom assessed, James W. Barker.	All tax for year 1898.	42 95	C. H. Wiltsie.
		Penalty	5 61	
		Penalty	1 20	
		Total	$49 76	
	Square 435: Sub lot 24 & imp... To whom assessed, James W. Barker.	All tax for year 1898.	32 88	Do.
		Penalty	4 60	
		Advertising	1 20	
		Total.....	$38 68	

356 501. *Real Estate Tax Sale, District of Columbia, April 12 to 19, 1899.*

Date.	Property sold.	Items of sale.	Amount sold for.	Purchaser.
April 14	Square 867: Part lot 19 & imp... To whom assessed, Minnie R. Ramsay.	All tax for 1898.....	15 89	C. H. Wiltsie.
		Penalty	2 22	
		Advertising	1 20	
		Total.....	$19 31	
	Square 867: Part sub lot 44..... To whom assessed, Ida M. Scott.	All the tax for the year 1898.....	2 09	Benjamin F. Edwards.
		Penalty	92	
		Advertising	1 20	
		Total.....	$4 21	
	Square 867: Part sub lot 45. .. To whom assessed, Ida M. Scott.	All tax for 1898.....	2 64	Do.
		Penalty	37	
		Advertising	1 20	
		Total.	$4 21	
	Square 867: Part sub lot 46 & imp. To whom assessed, Ida M. Scott.	All tax for 1898.....	43 98	C. H. Wiltsie.
		Penalty	6 16	
		Advertising	1 20	
		Total.....	$51 34	
	Square 867: Sub lot 80 & imp .. To whom assessed, Thomas W. Scott.	2 half tax for 1898...	6 72	Do.
		Penalty	74	
		Advertising	1 20	
		Total.....	$8 66	

357 By Mr. TOBRINER:

Q. Is there anything in this Liber 2419 which refers to any subsequent portion of the report, if any? A. It does not refer to any subsequent portion of the same report.

Q. You speak about ascertaining your information as to where this tax sale is reported from a reference book. What do you mean by that? A. Every date of record is put into a so-called reference book to show where the particular date of record can be found recorded.

Q. What law provides for the maintenance or keeping of a reference book? A. No law. It is simply a routine matter.

Mr. JOHNSON: I object to the witness being required to testify about the law.

By Mr. TOBRINER:

Q. So that it is a matter of convenience arranged for yourself? A. Yes, sir.

Q. You have been referring to a schedule of tax sale reports. Is that in a book, or how is that contained? A. A schedule?

Q. Yes; what is this thing on the wall here? A. It is simply the dates since 1878, when the first tax sale report was recorded here, the dates and the libers in which those various reports from 1878 to the present time, to last year, were recorded in. It is simply for the convenience of examiners.

358 Q. In the shape of a memorandum? A. In the shape of a memorandum.

Q. At whose instance or request was the report of the collector of taxes of the sales made April 12th to April 19th 1899 returned to the collector of taxes? A. Always at the request of the collector. He sends for it.

No cross examination.

GEO. F. SCHAYER.

Subscribed and sworn to before me this 2nd. day of June, 1904.

JOHN W. HULSE,
Examiner in Chancery.

At this point a recess was taken until 8 o'clock p. m. of the same day, at the office of Leon Tobriner, Equity building, Washington, D. C.

359 WASHINGTON, D. C., *March 19th*, 1903—8 o'clock p. m.

Met pursuant to adjournment at the office of Leon Tobriner, Esq., Equity building, Washington, D. C.

Present on behalf of the complainants, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendant H. Randall Webb, Mr. Perry.

Present on behalf of the defendants Cohen and Kann, Mr. Johnson and Mr. Wolf.

Whereupon LEON TOBRINER, a witness of lawful age, called by and on behalf of the complainants, having been first duly sworn, is examined,

By Mr. DARLINGTON:

Q. Please state your full name and your vocation. A. My name is Leon Tobriner. I am an attorney-at-law.

Q. You heard the testimony of Mr. Harry King in this case, to the effect that after the interview with Mr. Sigmund Kann, he left his case in your hands for further action? A. Yes, sir.

Q. Please tell us what you first did? A. Upon the receipt of the

telegram which has been offered in evidence, from Mr. Wiltsie, to the effect that the certificate had been redeemed, I called on
360 Mr. H. R. Webb for the purpose of ascertaining how much money was necessary to repay Mrs. Kennedy the amount that I assumed she had advanced for the purpose of redeeming this certificate, which she, or Mr. Webb in her behalf, had redeemed.

Mr. JOHNSON: I want to enter a general objection to Mr. Tobriner's testimony, on the ground that what he did is incompetent against any of the parties, except his own clients.

The WITNESS: I asked Mr. Webb whether he or Mrs. Kennedy had redeemed the certificate, and he told me that they had not. I asked him if he knew who had redeemed the certificate, and he told me that in all probability Mr. Myer Cohen had.

Q. Did he state why that was probable? A. In the course of that conversation he informed me that some ten days before Mr. C. H. Knight, who makes a specialty of investigating tax assessments, had called on him and advised him of this tax sale, and had endeavored to make some arrangement by which Knight would be intrusted with the business of procuring its cancellation. I asked Mr. Webb if he had [illegible] to anyone else about the tax sale at or about that time, a[illegible]d me that several days before that he had spoken to Mr. [illegible]hen about it.

Q. Please tell us w[illegible] else took place between you and him, on that occasion, bearing upon the controversy here? A. I discussed the relationship that had existed between the Kings and Mrs. Kennedy. He told me, however, that Mrs. Kennedy had decided to insist upon a forfeiture of the lease, and that Mrs. Kennedy
361 might make a new lease to the Kings; but that it would have to be at a greater rental.

Q. Did he say why Mrs. Kennedy had decided upon a forfeiture? A. He gave me to understand that it was only because of the nonpayment of these taxes. He told me that the Kings if they took a new lease, would have to pay as much rental as anybody else, and that they must first surrender the old lease.

Q. What, if anything, did he say about who should have the preference of a lease? A. That he would give that to the Kings, provided, of course, that they paid as much as anybody else did. He said that Mrs. Kennedy had not been receiving as much rent under the old lease as the property was then worth.

Q. What, if anything, did he say as to any efforts made by him or by Mrs. Kennedy to relieve this difficulty after the Knight interview? A. That they had made no effort whatsoever. This interview I am now speaking about, took place, as I recall, on the third of October, 1901.

Q. Did anything else occur at that interview? A. Not that I can recall particularly.

Q. What was the next occurrence connected with this controversy, so far as you were concerned? A. On the morning of October 4th,

the record of the tax deed from the Commissioners of the District of Columbia to Myer Cohen was reported in the real estate court
362 records. I thereupon telephoned to Mr. Myer Cohen asking him if he would be in his office if I called. He said he would wait for me. I went around to see him, and I saw Mr. Cohen. I told him I had come around for the purpose of ascertaining whether he would make a conveyance or quit claim of that property to the Kings; whether he would sell the deed. He said that he had not decided and could not tell whether he would sell it or not. I then talked the matter over with him and said to him, as well as I can recall, that as far as I could remember this was the first tax title he had purchased, and I did not see that he had any use for it; that he was neither the mortgagee or the tenant of the property and had no interest in it, and I did not see why he wanted to hold it. He then said to me: "You know that I have been for some time trying to get a lease of these premises for the Kanns, and I bought this tax deed with the expectation of forcing the Kings out of the property, and of being able to put the Kanns into possession of it."

Q. What, if anything, did he say about Mrs. Kennedy in that connection? A. I asked him how he could do that, and how he expected to do it. He said he could easily arrange for a lease from Mrs. Kennedy. In that connection I then told him that I thought he had gone the wrong way about getting possession of this property. He said no, that the matter could easily be arranged, that the Kings could be sued for the possession of the property upon this forfeiture by Mrs. Kennedy, having been guilty of a forfeiture,
363 and they could make default in the proceedings for possession upon being paid a lump sum of money by the Kanns, and for that a judgment would be rendered against them by default.

Mr. PERRY: I assume, Mr. Darlington, that you offer this testimony on the averments in the bill relating to collusion between Mr. Webb and these parties. I do not suppose it would be competent under any other theory, and I object to it except in so far as Mr. Darlington promises to prove collusion between them.

Mr. DARLINGTON: The Court of Appeals, in its decision, has said that the facts connected with this taxpurchase should be explained to the court, and I am simply endeavoring to give all the facts I can.

Mr. PERRY: I want to enter an objection to its relevancy on any other theory.

The WITNESS: In that connection he told me that I would be surprised to find how much he had paid for that tax certificate, to Mr. Wiltsie; that he had acted in the purchase of it on his own responsibility; that he had acted hurriedly in the matter; that he really did not know what disposition he would make of the tax deed, whether he would sell it or not; that he would have to consider the matter; and, if I recall rightly, that he would in all probability have to consult counsel and others. We talked the matter over, and

he said: "You can submit an offer for the purchase of it and I will consider it." I said to him: "I cannot make you an offer unless I have a basis on which to make the offer." I told him the
364 Kings would probably reimburse him for all that he had paid for the tax deed, for all his expenses, and would compensate him for his trouble in obtaining the tax deed. I could not make him an offer without having some basis. I would be working entirely at sea if I offered him $5,000 for it, because I did not think it was worth that, and I simply wanted to compensate and reimburse him.

Q. What reply did he make? A. He finally said that I could submit an offer anyway.

Q. What was your reply to his suggestion that there should be a landlord and tenant proceeding, and a default by the Kings? A. I told him that was out of the question, that nothing of the kind could be done. That the Kings would insist upon remaining in possession of the premises, and standing on their lease. I also said to him when I first went there that of course whatever I said to him and whatever he said to me I would use, because there would in all probability be litigation in the matter. He said that he expected that.

Q. What, if anything, was said by you or by him as to the manner in which he had been put upon this enterprise of acquiring this tax title? A. He told me that he had been first informed of the tax sale by Mr. Louis Kann, and that Mr. Knight had also called upon him. Then I said to him: "Why, Mr. Webb tells me
365 that he told you of this tax sale, and saw you about it." He said: "No, Louis Kann was the first one who told me of the tax sale."

Q. What action, if any, did he state to you he had taken towards acquiring the tax title, before Mr. Webb spoke to him? A. He did not say that he had taken any.

Q. Did you ask him what he had paid for the tax certificate? A. I asked him what he had paid for the tax certificate, and he would not tell me. He said that I might write to Mr. Wiltsie and ascertain that fact.

Q. Did you write to Mr. Wiltsie? A. I did write to Mr. Wiltsie.

Q. With what result?

Mr. JOHNSON: I object to that. If there is any correspondence with Mr. Wiltsie the letter should be produced.

A. I got a reply from Mr. Wiltsie.

Q. Have you that reply? A. I have it among my papers. The correspondence was in January, 1902.

Mr. JOHNSON: I object to any testimony on this subject because any correspondence between Mr. Wiltsie and Mr. Tobriner is incompetent against the purchaser of the tax certificate.

Mr. DARLINGTON: I submit that if Mr. Cohen referred Mr. To-

briner to Mr. Wiltsie for the information, any information he received from him would be competent.

Mr. PERRY: I object to this testimony on the ground that it is incompetent against Mr. Webb.

366 Mr. DARLINGTON: I concede that correspondence in January 1902 is probably a little too remote.

Q. At your interview with Mr. Cohen was anything said about the city of Rochester? A. Yes. This interview took place on the second floor of Mr. Cohen's office. I came down the steps with him, and as I got to the door, I said that it was very cold—I remarked upon the condition of the weather. He said: "Yes, it was pretty cold in Rochester. Then I said "You went up there to close this transaction and get this tax certificate. He said: "Yes, I went up myself."

Q. What was the next step you took in this matter with either Mr. Webb or Mr. Cohen? A. The next interview I had was with Mr. Webb. I think I received a letter from Mr. Webb under date of October 14th which is in the record, calling my attention to the fact that he had been compelled to take up or had taken up some taxes on the little piece of back ground.

Mr. PERRY: Can you refer us to that letter?

A. It is a letter under date of October 14th, 1901, from Henry Randall Webb to Messrs. Darlington and Tobriner, marked Exhibit G, filed with the bill of complaint in this cause.

I received that letter, I think, on the 15th, and went over to see Mr. Webb for the purpose of investigating these tax bills upon these little back strips. After I had looked at the tax bills and the receipts I naturally referred to this matter again.

367 By MR. DARLINGTON:

Q. What took place? A. As well as I can recall, I asked Mr. Webb why he did not take up the tax certificate when he ascertained that fact.

Q. What fact? A. From Mr. Knight; and he said he did not have time to. I then asked him if he had seen Mr. Cohen for the purpose of arranging a quit claim deed, and he said no, he had not seen him at all. I said to him: "Mr. Cohen tells me that you did not see him at all, in reference to the fact of this tax sale, after he had obtained the information from Mr. Knight, and he said: "Yes I did." He insisted that he had seen Mr. Cohen. I then asked him if he was not going to make some effort to obtain a quit claim deed, to obtain Mr. Cohen's title, and he said he might thereafter; that they might take it up. I said to him: "Has Cohen demanded the possession of the property from you, or has he sued you in ejectment for it?" He laughingly answered: "There is no danger of that."

Q. Going back to your interview with Mr. Cohen, about which you have told us, what if anything did he say to you about the

manner in which this money would be paid or might be paid, if the suggested landlord and tenant proceedings that he spoke of were arranged? A. When I told him the thing could not be done in that way and that the Kings were not in a position to part with that lease he said: "Oh, it could be done that the agreed
368 amount could be left with me or left with somebody else, or that the Kings could find the consideration for making a default and giving up the possession of the property in this landlord and tenant proceeding, brought to recover the possession of the property.

Q. What, if anything, was said to you at either of these interviews by Mr. Cohen or Mr. Webb about an arrangement for a lease having been already entered into between the Kanns and Mrs. Kennedy? A. Nothing whatever.

Q. After your second interview with Mr. Webb what next took place? A. Several days after that Mr. Cohen came to my office to see me about arranging the affairs of the syndicate holding square 773. In that syndicate the Kings were supposed to have an interest. We discussed that matter for a while, and after we got through, I said to Mr. Cohen: "Have you made up your mind to let the Kings have that tax deed?" He said: "No, I have been waiting for you to come back with an offer for the purchase of it." I said to him that I could not make any offer under the circumstances, because I had no basis on which to go. He then complained to me about the manner in which Mr. Harry King had treated him at a meeting of the parties in interest in this very syndicate holding square 773, a few days prior to that, and he said to me that Harry King ought not to feel personally aggrieved at him, that it was merely and purely a business matter with him in which he was representing others; that he had
369 bought this tax certificate for the Kanns; that it was suggested to him he should go to Rochester for that purpose; that they had furnished the money with which to make the purchase and that he held it in trust for their benefit alone; that he had no individual interest in the matter. I then said to him: "Why, you told me the other day when I was in your office that you had bought this upon your individual responsibility; that you did not know for what purpose you were going to use it, and that I would be surprised at the amount you had paid for it. He insisted that I had misunderstood him. That was the first direct information I had that the Kanns were at all interested in the purchase.

Q. Do I understand that your first correspondence began with Mr. Wiltsie in January, 1902? A. Yes, sir.

Mr. DARLINGTON: As this was after the suit was begun I presume I cannot introduce these letters without the consent of counsel. I would be very glad, however, to have them in if counsel will waive their objection.

Mr. JOHNSON: I do not know what they are.

Mr. DARLINGTON: You will know what they are if you will let me put them in evidence.

Mr. JOHNSON: I will state whether I have any objection to their going in or not after I see them.

By Mr. DARLINGTON:

Q. Is there any other fact or circumstance known to you that bears upon this matter, with which any defendant in the case
370 is connected? A. Nothing material that I can recall.

Cross examination.

By Mr. PERRY:

Q. When did you have any professional retainer from the Kings, or from Mrs. King in connection with this lease. A. I had no retainer in connection with this lease until about the time we began this litigation; but I had been the attorney for the Kings for some years prior to the institution of this suit, and had also transacted a great deal of business for their father, whenever he required it.

Q. When were you first consulted by Mrs. King, or by anyone in her behalf, with respect to this lease? A. In what connection?

Q. In any connection, unless you object to stating it, and if so I will not press it. A. Of course I knew of the lease casually at the time of the death of Henry King, Jr., but I did not have occasion particularly to pay any attention to the lease until about the time of the institution of this suit.

Q. Did you prepare the petition filed in the orphans' court that was given in evidence here at the morning session? A. Yes.

Q. Did you also prepare the answer of Mr. Harry King, which was given in evidence here this morning—the answer to the third amended bill? A. Yes.

Q. You prepared that? A. Yes.

371 Q. After that what was the next connection you had with this lease? A. It was the assignment of the lease from Harry King administrator *c. t. a.* to Caroline King.

Q. I believe that is in evidence here? A. Yes; that is in the record.

Q. After that what was the next thing you did? A. I do not recall that I examined the lease at all or had anything to do with the lease, except in preparing the answers in the equity proceeding.

Q. I say after that time? A. Nothing, until this litigation began.

Q. When did you first know of any default having been made by Mrs. King? A. When Mr. Harry King brought me the letter from Wiltsie.

Q. And you positive about that? A. Yes.

Q. Then I assume that when Mr. Harry King went to see Mr.

Harry Randall Webb, about the 21st of May 1901, you knew nothing of that visit? A. No.

Q. You knew nothing of any default, and were not consulted about it until you got this telegram or letter from Wiltsie? A. Not until the letter from Wiltsie advising them that he held the tax certificate.

Q. Can you give the date of that? A. It is in the record here?

372 Q. I would like you to be particular about that. A. My impression is that it was sometime in July, 1901. The letter is in evidence here. It was offered the other day when Mr. Rodgers was on the stand. It is marked Rodgers' Exhibit No. 9, and is on page 78 of this testimony.

Q. You refer to the letter at page 78 of this record, marked Rodgers Exhibit No. 9, dated Rochester New York, July 24th, 1901? A. Yes, sir.

Q. That was the first knowledge you had of any default in the rent? A. It was after this letter was received by Mr. Harry King and he brought it to me.

Q. When Mr. Harry King went to see Mr. Webb in May, 1901, did you not know that he carried with him a copy of this lease? A. No, sir.

Q. Don't you know that the copy was prepared in your office? A. I do not know that. He may have had it prepared by the typewriter.

Q. You did not know it? A. I did not know of it. I don't know that he had it, and I do not know that it was copied in this office.

Q. At page 20 of the printed record of the case in the Court of Appeals there appears a letter signed by Mr. Darlington and yourself, dated October 8th, 1901, and marked Exhibit D. Did you send that letter? A. Yes.

373 Q. That letter was signed by Mr. Darlington and yourself? A. Yes.

Mr. PERRY: I offer this letter in evidence.

The above-mentioned letter is, by agreement, copied from the printed record of this cause in the Court of Appeals.

374 By Mr. PERRY:

Q. Did you not get a reply to that letter, which is in the printed record in this case at page 20, and marked Exhibit E? A. Yes.

Mr. PERRY: I offer this letter in evidence.

The above-mentioned letter is, by agreement, copied from the printed record of this cause in the Court of Appeals, and is in the words and figures following, to wit:

375 By Mr. PERRY:

Q. Did you send to Mr. Webb the letter marked Exhibit "F," dated October 12, 1901, which appears on page 21 of the printed record of this case in the Court of Appeals? A. Yes.

Mr. PERRY: I offer this letter in evidence.
The above-mentioned letter is, by agreement, copied from the printed record of this cause in the Court of Appeals.

376 By Mr. PERRY:

Q. Did you, Mr. Torbiner, send to Mr. Webb the letter on page 77 of the printed record, marked Exhibit H. R. W. No. 1, dated October 17, 1901? A. Yes, sir.

Mr. PERRY: I offer this letter in evidence.
The above-mentioned letter is, by agreement, copied from the printed record of this cause in the Court of Appeals.

377 By Mr. PERRY:

378 Q. Did you also send to him a letter dated October 22, 1901, appearing on page 77, and marked Exhibit H. R. W. No. 2? A. Yes.

Mr. PERRY: I offer this letter in evidence.
The above-mentioned letter is, by agreement, copied from the printed record of this cause in the Court of Appeals.

By Mr. PERRY:

Q. Did you receive from him the letter marked Exhibit H. R. W. No. 3, dated October 22, 1901, which appears on page 77 of the printed record of the Court of Appeals in this case? A. Yes.

379 Mr. PERRY: I offer this letter in evidence.
The above-mentioned letter is, by agreement, copied from the printed record of this cause in the Court of Appeals.

By Mr. PERRY:

Q. Do you know whether or not Mr. Darlington received the letter and proposition for a compromise appearing on page 78 of the record, marked Exhibits H. R. W. Nos. 5 and 6, dated October 30th, 1901? A. Yes.

380 Mr. PERRY: I offer this letter and proposition in evidence.
The above-mentioned letter and proposition for compromise are, by agreement, copied from the printed record of this cause in the Court of Appeals.

381 By Mr. PERRY:

Q. Do you also know whether or not Mr. Darlington and yourself wrote to Mr. Webb in reply to this last letter and proposition, the

letter appearing on page 80 of the printed record, dated November 1st, 1901, and marked Exhibit H. R. W. No. 7? A. Yes, sir.

Mr. PERRY: I offer this letter in evidence.

The above-mentioned letter is, by agreement, copied from the printed record of this cause in the Court of Appeals.

382 Cross examination.

By Mr. JOHNSON:

Q. Mr. Tobriner, you signed with Mr. Darlington, as solicitor for the complainant, the bill of complaint in this cause? A. Yes, sir.

Q. Did you take part with Mr. Darlington in its preparation? A. Yes, sir; to a certain extent.

Q. You were aware at that time of the facts as to which you have testified, occurring antecedent to the filing of the bill of course? A. Yes.

Q. In view of any objection made to some of your testimony, and the suggestion of counsel with regard to it, I will ask you to state, if you can, what, if any, part of the bill in this case charges collusion between Mr. Webb and Mr. Cohen or the defendant Kann, with respect to the acquisition or use of this tax certificate from Mr. Wiltsie.

Mr. DARLINGTON: I object to the question and advise the witness not to answer it, my objection being that it calls for no testi-
383 mony or evidence of facts within his knowledge, but simply asks for his construction of the bill in this case.

Mr. TOBRINER: I wish to add that I am simply here as a witness, and would not feel that I ought to argue the case from the witness stand.

By Mr. JOHNSON:

Q. Do you claim that there is any collusion, or do you say that you believe there was any collusion between them?

Mr. DARLINGTON: I object on the ground that Mr. Tobriner is placed here to state what he knows about the facts in this case, and not to state what his claim will be as counsel in the case. I advise that he decline to answer on that account.

By Mr. JOHNSON:

Q. Is it not a fact that in the preliminary hearing of this case before Mr. Justice Clabaugh, on the motion for an injunction, that the court asked if you claimed that Mr. Webb and Mr. Cohen and the Kanns were in collusion in this matter, and that you disclaimed any such charge? A. I do not recall that the court asked the question and I do not recall that we disclaimed it.

Q. Do you not recall that that was one of the subjects argued then,

and that the judge laid considerable stress on the absence of any such claim in the proceedings? A. I do not.

384 Q. Do you recall that in the course of the argument Mr. Darlington also admitted that they did not charge such collusion between Mr. Webb and Mr. Cohen or the Kanns? A. I do not.

Q. Or that there was any conspiracy between them, to accomplish anything? A. I do not so recall.

Q. Do you recall Judge Clabaugh saying that the bill did not charge conspiracy between them, and the disclaimer on your part and that of Mr. Darlington?

Mr. DARLINGTON: I object, because, in the first place, this is not calling for evidence of facts in the case, and, secondly, because what took place between counsel and the court at the argument of the motion for an injunction *pendente lite* is not a proper subject for cross examination of this witness, and for the further reason that Judge Clabaugh's opinion in the case is in writing, and I think it will be found to contain no such statement. I am quite willing that the opinion may be offered in evidence to show whether I am right or wrong about this.

Mr. JOHNSON: I never had the benefit of seeing that opinion.

Mr. DARLINGTON: Your side have a copy of it.

Mr. JOHNSON: I have never seen such a thing.

Mr. DARLINGTON: Mr. Johnson was present in court when I tendered it to Judge Clabaugh for revision and asked leave to file it.

Mr. JOHNSON: And I understood him to distinctly refuse to do so.

By Mr. JOHNSON:

385 Q. When was your first interview with Mr. Cohen? A. On the morning after the day on which the tax deed to him had been recorded.

Q. When was the next? A. The next was very nearly two weeks afterwards, if not more.

Q. Was the second interview at his office or at your office? A. At my office.

Q. Where was the next? A. There was no other interview.

Q. Only the two? A. Yes.

Q. Did you have an interview with Mr. Cohen in the corridor of the court house, in which you discussed this subject to some extent in the presence of Mr. Adolph Wolf? A. I do not recall it. I do not know that it was an interview.

Q. There was some talk on the subject? A. Some casual conversation.

Q. I do not care to characterize it as an interview; but you did have some talk with him on the subject? A. I do not recall it just now.

Mr. DARLINGTON: I would like to have counsel identify the time of this interview referred to.

By Mr. JOHNSON:

Q. I will say within a week or ten days after the interview in your office. A. Yes, I recall now. I do not know under
386 what circumstances; but I met Mr. Cohen, I think, near the entrance to the clerk's office or perhaps a few feet to the west of that. There was very little said that I can recall, at that time. I think Mr. Cohen undertook to open the conversation with me, and something was said about the death of Mr. King. Mr. Cohen had started to suggest that the death of Mr. King took place some time prior to this default in the payment of taxes, and I think, as I recall it now, that Mr. Adolph Wolf interrupted Mr. Cohen and told him not to tell all he knew.

Q. Did you make any memoranda of these interviews and conversations? A. Yes—those I have testified to.

Q. Did you preserve them? A. Yes.

Q. At the time you testified, and before I called your attention to it, you had forgotten about the talk in the court house. A. I had forgotten the fact, but when you recalled it to my mind I remembered that it took place.

Q. But before I recalled it to you you had forgotten it? A. I had not given it a thought. There was nothing of importance that occurred, and consequently I did not give it any thought.

Q. Did you and Mr. Cohen meet more than once with respect to the syndicate affecting square 773? A. I think he called
387 twice, at the most. He was endeavoring to negotiate the purchase of the King interest in that syndicate, on behalf of the others who held larger interests.

Q. Did you and Mr. Cohen have any conversation on the subject of this controversy at the second interview? A. No.

Q. Do you remember the circumstance of his bringing you a check? A. I remember he did bring me a check for that certificate, held by the Kings.

Q. Do you remember whether, at that time, there was any conversation between you and Mr. Cohen relative to this controversy? A. No; I had made up my mind not to have any more talk with Mr. Cohen about the matter, and if he did attempt to talk with me about it I simply closed the interview and conversation.

Q. Are you very sure that Mr. Cohen told you Mr. Knight had called upon him and had any conversation with him? A. That is what I understood from him.

Q. Are you very confident about that? A. I am fully satisfied he told me that.

Q. That is what I mean. A. Yes.

Q. And that was at the first interview? A. That was at the first interview. He told me that Mr. Louis Kann was the first
388 one who advised him of the fact of the tax sale and that Mr. Knight had called afterwards.

Q. Did not Mr. Cohen tell you, at the second interview at your

office, when you said something about Knight, that he did not know Mr. Knight; that he had never seen him and would not know him if he met him? A. I think he did say something to that effect at the second interview. I am not even positive about that; but my impression is that he did, when I called the matter of Knight to his attention again. That was in the same interview in which he told me that I had assuredly misunderstood him, if I had understood him to say to me that he had bought this tax deed upon his individual responsibility.

Q. You do not mean to say that you have repeated Mr. Cohen's exact words in any of these interviews, I suppose? A. Not except in two instances. I am undertaking to repeat his exact language when he said: "You will be surprised to know what I paid for this tax certificate." I am also quoting him in the statement that he said to me that he had bought it upon his individual responsibility. The rest is the substance of our conversation.

Q. Did he not tell you in the first interview that he did not know how he would use the tax title, or just what use he would make of it? A. He told me that he had not concluded what to do with it, and that he did not know whether he would sell it or not.

389 Q. You said that, at the second interview, Mr. Cohen made a certain statement to you, and I cannot recall now just how you put it. You said that was the first intimation you had that he had purchased this tax certificate for the Kanns, or that they were in any wise interested in it? A. Yes.

Q. What was that? A. He complained to me about the manner in which Harry King treated him at a meeting which had been held some days previous by the syndicate owners of this square 773.

Q. You mean some personal unpleasantness? A. Yes.

Q. He considered that Mr. King had been personally disagreeable? A. Simply that he had not treated him with proper respect, and did not acknowledge his greeting. That was the real complaint. He then undertook to justify himself by saying that Harry King ought not to feel aggrieved at him personally, because of the fact that he had not acted for himself but had bought it for the Kanns.

Q. And that you say was the first intimation or suspicion that you had that the Kanns were interested in the matter? A. That was the first direct intimation I had and the first direct assertion that I had ever heard from anybody who ought to know about the transaction.

Q. It was the first thing from Mr. Cohen that indicated
390 that the Kanns had any interest in it? A. Exactly.

Q. That being so, are you not mistaken in your recollection when you state that at the first interview on the third or fourth of October, at Mr. Cohen's office, Mr. Cohen, when you called his attention to the fact that he was not a dealer in tax titles, explained his purchase of it by saying that you knew he had been trying to get the property for the Kanns and that he proposed to have Mrs. King's

lease forfeited, and make a lease to the Kanns, and then proposed that the Kings should suffer judgment by default at Mrs. Kennedy's instance, for possession, and let the property go so that the Kanns would get possession of it? A. No, I am not——

Q. That having taken place at the first interview—— A. Let me continue my answer—because Mr. Cohen, in that first interview, impressed upon me the fact that he had bought this on his individual responsibility and I could not assume, after he told me that, that the Kanns were interested in it. I knew that Messrs. Kann and Mr. Cohen were very close to each other; and when Mr. Cohen assured me so positively that he had bought this upon his individual responsibility, I supposed that he was buying it himself.

Q. Then after he told you that he proposed to make it the medium of getting possession of the property for the Kanns, it did not convey to your mind the idea that they had any interest in it?

Mr. DARLINGTON: I suggest that the question should be made clearer.

391 Mr. JOHNSON: I think the witness is quite as intelligent as I am or as any of us, and that he will understand it.

Mr. DARLINGTON: I submit that the latter part of the question is quite ambiguous. You ask "any interest in it." Does counsel mean in the tax certificate, or in the use he proposed to make of it?

Mr. JOHNSON: I mean in the use of the tax certificate.

The WITNESS: No; no interest in the tax certificate; nor did I, for a moment, think that they were behind the purchase at that time, because of Mr. Cohen's assertion that he had bought it for himself. I thought he could have used it for the purpose of helping the Kanns out, but so far as the Kanns being the actual owners of this tax certificate, I did not so infer.

Q. Let me ask you if you are not confused in your recollection and mistaken in another respect. Is it not a fact that when Mr. Cohen called to see you the first time with reference to this syndicate business, which was along about the fifteenth of October, was it not? A. After that time; about the 19th of October.

Q. Is it not a fact that in connection with his statement about the unfriendly attitude of Mr. Harry King, he stated to you that if this matter was going to bring on litigation he hoped that it might be avoided, and asked you if it could not be compromised; and did you not tell him that you did not see how it could be because

392 of the pending litigation between the Kings and the Ohio national bank and other creditors, attacking the validity of that assignment? A. No.

Q. And that under those circumstances they could not undertake to make any arrangement; is not that the fact? A. No; that took place at the first interview when I told him that they were not in a position to sell or assign that lease. Then came his suggestion that

having arranged with the Kanns to pay them a lump sum for the possession of the premises they should let judgment go by default. That was all during the first interview.

Q. Was not that the suggestion he made to you to get over the difficulty he suggested, arising out of the Ohio National Bank litigation? A. I told him in that first interview, as I have already testified, that if he wanted to obtain an assignment of that lease for the Kanns, he had gone about it in the wrong way, and that he could not get a lease for the premises under any circumstances. Then I explained to him that this lease was in litigation. Then he suggested this other thing I have just told to you.

Q. That is just what I was coming to. As a matter of fact he suggested, as a means of obviating any difficulty growing out of the Ohio National Bank litigation, that it might be compassed by recourse to one of two methods, either that they should suffer judgment by default for a consideration that was to be paid them in the proceeding of forfeiture, or that a sum of money should be paid down,
393 or paid to you, or laid on a table where they could get it. A. He suggested that should be done.

Q. As a way of meeting any difficulty growing out of the Ohio National Bank litigation? A. Yes; it might have been in that connection.

Q. Now, Mr. Tobriner, are you not mistaken, and is it not a fact that the conversation took place for the first time on the occasion of this interview between you and Mr. Cohen, when this business of square 773 was in hand, in your office? A. No.

Q. You think you are not mistaken about that? A. No, sir.

Q. When did you first have an interview with Mr. Knight; before or after your second interview with Mr. Cohen? A. I think it was before my second interview with Mr. Cohen.

Q. How long was it, as nearly as you can recall, between your second interview with Mr. Cohen and the interview in which he brought the check for square 773; how far apart were those interviews? A. I think that took some time.

Q. As much as a week? A. Yes; perhaps two weeks, at the most.

Q. Was this casual conversation in the court house between these two interviews? A. My impression of that is that it was after this bill had been filed.

394 Q. When was that with reference to the settlement of the matter about square 773; did that take place before or after the filing of the bill? A. The purchase of the interest in square 773 took place, as I recall it, before the filing of the bill.

Q. I mean the final settlement, when the check was exchanged. A. I think that was before the filing of the bill.

Q. The bill was filed on the fourth of December? A. Yes.

Q. So that it was certainly before that time that the matter about square 773 was finally settled by the payment and delivery of the check? A. Yes; that is my impression.

Redirect examination.

By Mr. DARLINGTON:

Q. You have been asked by Mr. Perry whether you prepared the petition in the orphans' court for the appointment of Mr. Harry King as administrator *c. t. a.*, and his answer to the third amended bill in the Ohio National Bank case, and you said that you had. Please state from what source you got your information as to the Kennedy lease for 715 Market space? A. My impression is that I had the lease here at the time; and if there was any mistake in setting out the term of that lease it was my mistake.

Q. If I am not mistaken in the dates, that third amended
395 bill and answer were filed some two years ago? A. Some time in 1901. The answer was filed in August 1901.

Q. What efforts in the direction of proving the allegations of that third amended bill have been made? A. None whatever.

Q. Has any testimony been offered? A. None whatever.

Q. You said in reply to one of Mr. Johnson's questions that you prepared a memorandum of the interviews with Mr. Cohen about which you have testified? A. Yes, sir.

Q. Please look at the papers now handed you and state whether or not those are the memoranda in question? A. Yes, sir; they are.

Q. How soon after your interview with Mr. Cohen on October 4th, did you prepare a memorandum of that interview? A. Immediately upon my return to my office.

Q. Upon the same day? A. Yes, sir.

Q. How long before your second interview with him? A. The second interview took place October the 19th, consequently it was 15 days before, practically.

Q. Now I will ask you to read the last five lines of the first page and the first two lines of the second page of that memoranda of October 4th, and refreshing your recollection by it, tell us whether or not the suggestion by Mr. Cohen of a way in which there
396 could be a default in a landlord and tenant proceeding in consideration of a lump sum of money took place at that first interview or at the second interview? A. It took place at the first interview, October 4th.

Q. Is that contained in your memoranda? A. Yes, sir.

Mr. JOHNSON: I object to that as being a manifestly incompetent question and an improper answer. What is in the memoranda is proved by the memoranda itself, and the memoranda is incompetent evidence to corroborate or support the testimony of the witness.

Cross examination.

By Mr. PERRY:

Q. The original lease, as I understand you with the renewals upon it which had been made up to that time, were before you at the time

you prepared the petition in the orphans' court and the answer to the third amended bill in the equity suit? A. I don't know whether they were before me when I prepared the answer to the third amended bill.

Q. Did you consult them? A. I can't say whether I did or whether I did not. I must have had the lease, as well as I can remember, before me when I prepared the petition for the sale in the orphans' court; but there were so many endorsements on the lease, of extensions, that I must have made a mistake in calculating the time.

397 Q. The lease is in your possession this evening? A. Yes, sir.

Q. How long has it been in your possession this last time? A. Since we began this litigation.

Q. It was not in your possession in the interim? A. No.

Q. You stated in answer to a question by Mr. Darlington that no efforts had been made in this equity suit of the Ohio National Bank against King, to prove the averments of the third amended bill. I understand the case is still pending? A. The case is still pending.

Q. Is not that the same case in which Mr. Harry King is one of the receivers? A. Yes; that is the case in which Judge Barnard and Harry King were appointed receivers.

Q. And they are still acting under the decree appointing them receivers? A. They are still acting as receivers.

Q. Under the decree appointing them in that case? A. Yes.

By Mr. DARLINGTON:

Q. Can you tell me whether this appointment of receivers was before or after the filing of the third amended bill? A. The third amended bill was filed on the 24th day of June 1901, and re-

398 ceivers were appointed on the 19th day of May, 1899.

By Mr. PERRY:

Q. You have been the attorney for Mrs. King and for her sons in this whole proceeding, from the time of the death of Henry King, Jr., up to date; have you not? A. Yes.

Q. I would like you to be a little more specific, if you can, as to the part you took with Mr. Darlington in the drafting of the original bill in this pending case, in which we are taking testimony? A. As well as I recall it, Mr. Darlington dictated that bill in my presence, and I made such suggestions as I thought were necessary as we went along.

Q. Who supplied Mr. Darlington with the facts averred in that bill? A. I supplied them.

Q. What facts have you knowledge of now which you did not have knowledge of at the time the bill was prepared? A. That is hard for me to state.

Q. You are very conversant with this whole matter are you not? A. I do not know that I am very conversant with it.

Q. You are conversant with it? A. Yes.

LEON TOBRINER.

Subscribed and sworn to before me this 27th day of May, A. D. 1903.

JOHN W. HULSE,
Examiner in Chancery.

399 The further taking of these depositions was thereupon adjourned until Friday, October 20th, 1903 at 3.30 o'clock p. m.

400 POWERS BUILDING, ROCHESTER, N. Y.,
WEDNESDAY, *May* 13, 1903—11 o'clock a. m.

Met pursuant to agreement at the office of Charles H. Wiltsie, Powers building, Rochester, N. Y.

Present on behalf of the complainants, Mr. Tobriner.

Present on behalf of the defendants, Mr. Johnson.

It is hereby stipulated and agreed by and between counsel that the witnesses Charles H. Wiltsie and Elizabeth J. Waton may be sworn by John P. Morse, a notary public in and for the county of Monroe, State of New York, and their depositions may be taken stenographically and transcribed by John W. Hulse, an examiner in chancery in and for the District of Columbia, and read in evidence in the trial of this cause, subject to such objections to the competency of the testimony itself as may be raised at the trial.

CHARLES H. WILTSIE, a witness of lawful age, called by and on behalf of the complainants, having been first duly sworn, is examined

By Mr. TOBRINER:

Q. Mr. Wiltsie, state your name, residence and occupation. A. Charles H. Wiltsie. I reside in Rochester, N. Y. I am an attorney by profession.

401 Q. Are you the same Charles H. Wiltsie who purchased sub-lot A. in square 432, Washington, D. C. at a sale thereof for taxes in April, 1899? A. I am.

Q. Are you acquainted with the defendant Myer Cohen? A. I am.

Q. Will you be kind anough to state when and under what circumstances you first met him and what business transactions, if any, took place between you? A. In the early part of October, 1901, Mr. Cohen came into my office one morning and introduced himself by his card as an attorney from Washington. He made inquiry with reference to the tax certificate just mentioned, and stated that he was passing through Rochester on a trip and wished to know whether I still held the certificate and whether he could obtain it.

I think he said he had been at Niagara Falls or at New York and was stopping here simply as one place on a business trip. I explained to him that the tax certificate had been sent to Washington for delivery and payment through the Central national bank. I asked my cashier to bring the correspondence in the matter, and it appeared that the tax certificate was then at the Central national bank with a sight draft drawn on Mr. King for payment. Mr. Cohen asked if I knew that the papers had been actually taken up and my cashier explained that they had not been and that she was about to write the bank to return the paper. He asked me if I would dispose of the certificate to him. I asked him then if he represented interested parties in the property, and he stated
402 that he did. I told him it was a fixed rule in the office not to dispose of tax certificates to parties who were not interested in the property or the title. He stated again that he represented certain interests in the property, and gave me to understand that there were certain controversies about the matter. He did not make any detailed explanation.

Q. What then took place? A. I was trying to recall the course of the conversation from that point. I do not know whether he asked me what I would take for the certificate or whether he asked me if I would entertain an offer for it; but after a bit of conversation along that line, he made an offer of $500 for the certificate. My clerk, Miss Watson, was in the room at the time, and we looked at each other with a smile, understanding that it was a large offer. I told him that if he represented interested parties and the certificate had not been taken up at the bank, he could have it. I told him we would recall the certificate by mail and send it on to him for collection. He explained that he would like to have the matter closed while he was here, and wished to pay the money. I explained to him that I could not take his money as I did not know whether the certificate had been taken. He wished me then to telegraph and about the same time suggested also that if I would telephone the Central national bank, he would pay the expense of telephoning. I did telephone at his expense, and learned that the certificate had not been paid. I directed the bank to return the papers by
403 earliest mail. I also telegraphed at Mr. Cohen's request, to return the paper.

Q. What was the amount he offered you for the certificate? A. $500.

Q. And was that amount eventually paid? A. It was paid on the following day.

Q. Were you present when it was paid? A. I was not. I did not see Mr. Cohen from the afternoon of the day on which this conversation took place until I saw him again in Washington.

Q. About what time was it that Mr. Cohen first came into your office? A. I should say it was 10 or 11 o'clock in the morning.

Q. What time was it that you telephoned to Washington asking

the bank to return this certificate? A. I should say it was early in the afternoon.

Q. What is the name of your cashier; Miss Watson? A. Miss Watson.

Q. Miss Elizabeth J. Watson? A. Elizabeth J. Watson.

Q. You say both you and she smiled at the offer of $500 for the certificate. What was the cause of the smile? A. Because it was a large sum, much more than we had expected from King. I would like to say with reference to the time I telephoned the bank that it might have been later in the afternoon. I know there was some talk in the course of the negotiations as to whether it was possible to communicate with the bank on account of the lateness of
404 the hour. It is my impression the banks of Washington close earlier than they do here.

Q. Did Mr. Cohen inform you or advise you of the character of the interest that the parties whom he represented claimed in the property? A. No, he did not.

Cross-examination.

By Mr. JOHNSON:

Q. Mr. Wiltsie, this interview you had with Mr. Cohen was the only interview on this subject? A. During that day.

Q. The only one? A. Yes, during the morning and the afternoon. He came here twice.

Q. Did he make two visits to your office that day? A. Yes, though I think the afternoon visit was relatively short. The principal interview was in the morning.

Q. You think he came back in the afternoon that day? A. Yes; I am certain of that. He came back here, but was here only a short time.

Q. You think your recollection of the details of that transaction is very distinct? A. On those parts I have testified to; yes, sir.

Q. You are certain he made two visits? A. I would not be surprised about that. I think he came in the afternoon and inquired what we had heard by telephone from the Central bank,
405 where the papers had actually been sent out.

Q. I am asking you not about the reasons of what you think but about your recollection as to whether he made two visits that day? A. Yes, that is my recollection.

Q. And you are certain he was here in the forenoon? A. Yes sir.

Q. Do you know anything about the train travel between this city and the city of New York in October of 1901? Do you know such a train as the Empire express between New York city and this city? A. Yes.

Q. Do you know what time it arrives here? A. It arrives here now at 3.23 in the afternoon.

Q. Do you know what time it arrived here at that time? A. I think a little bit later.

Q. Did it ever get here in the morning at that time, within your knowledge? A. No.

Q. How long was Mr. Cohen here in your office? A. Well, he was here the first time I should say an hour or more.

Q. And how long the second time? A. Why, he was in and out two or three times, is my recollection.

Q. There were three visits? A. I said in and out. I should say two or three times; probably only twice.

406 Q. Were the two subsequent visits made in the afternoon? A. I don't know. It was during the business day.

Q. Where was the telephoning done? A. From this office.

Q. Did you do it yourself, or your clerk? A. I did it.

Q. From this office? Do you mean from your own office or from this building? A. From my own office. I have a telephone here.

Q. Was Mr. Cohen present when you telephoned? A. I think he was.

Q. Did you get immediate response from the bank? A. I talked with one of the officers there; yes.

Q. Did you tell Mr. Cohen at the time of the conversation through the telephone what response you got from the bank? A. Yes, sir.

Q. Was he present when you telephoned? A. I think he was.

Q. He heard what you said? A. I think he did.

Q. And you told him what reply you got? A. Yes; that is my recollection about the matter. He might have been in here and the door closed. I don't know whether he heard it or not.

Q. I am asking your recollection about it. A. Yes, sir; that is my recollection.

Q. Let me see if I can refresh your recollection about that.

407 Did not Mr. Cohen tell you on his first visit that he had just arrived in the city from the city of New York on the Empire express? A. I don't remember that he did.

Q. Can you say he did not? A. No; I would not say he did not. Mr. Cohen gave me to understand, from the conversation, that he had come from some other place than Washington and that he was stopping here as an incidental matter; that he had not come here directly from Washington on a special business trip.

Q. I want you to think about it and see if you are not mistaken as to his having come here in the forenoon? A. We have only one session in this city in business It begins in the morning and continues until we get through. Sometimes we go to lunch and sometimes we do not; and morning and afternoon are not clearly divided, perhaps.

Q. Then it is quite possible you are mistaken? A. He may have come into the office possibly before 12 o'clock, but it was in the early part of the day.

Q. Is it not a fact that he came here after the arrival of the Empire express in this city? A. I would swear he came into the office before 4 o'clock.

Q. Before 4 o'clock? You are certain of that? A. Yes, sir; I am. Well, before 3 o'clock.

Q. Will you swear he came here before 2 o'clock? A. I don't know. That is my best recollection that he came in here late in the morning.

408 Q. Would you say positively he came here before 1 o'clock. A. Yes, that is my best recollection.

Q. Will you say positively that he came here and saw you more than once that day, that he paid you more than one visit? A. That is my best recollection.

Q. Are you not probably mistaken about that? A. I don't think I am.

Q. Let me ask you this question: You have travelled between here and Washington, have you not? A. Yes, sir.

Q. You had at that time? A. Yes, sir.

Q. Had you ever travelled by way of the city of New York? A. Never.

Q. Do you know any way by which you could have left Washington by way of the city of New York over the midnight train and gotten to Rochester before 3 o'clock the next day? A. I don't know anything about travel by way of New York city. I never went that way.

Q. Do you know any way by which you could have left Washington after 11 o'clock at night and gotten here the next day before 3 o'clock? A. I don't know anything about traffic in that way.

Q. You think Mr. Cohen was here on what you think was his first visit in the forenoon as much as an hour? A. Why, I

409 should think he was here towards an hour, and all the time there was conversation and telephoning and whatever was done.

Q. Was there more than one telephoning done? A. I don't think so.

Q. Was that on the occasion of his first visit or his last visit, as you recall it? A. I wouldn't say.

Q. Do you know whether he telephoned on the occasion of his first visit or not? A. No, I wouldn't say that.

Q. Would you say he did not? A. No, I don't remember particularly about that. I know I did telephone.

Q. Can you tell us anything that caused this interview with you to last as long as an hour? A. Well, visiting and talking about the business matter and negotiating. Perhaps it didn't last an hour. It might have been a little less.

Q. About negotiating—how many offers did Mr. Cohen make to you for the property? A. Only one.

Q. One offer of $500? A. Yes.

Q. Did you haggle over that or accept it? A. I accepted it, if I could get the certificate, if it had not been already redeemed at the bank.

Q. That was not an extended negotiation then? It consisted of

an offer on his part and an acceptance by you? A. There was considerable conversation leading up to it.

410 Q. Let me see if I cannot refresh your recollection about what actually took place. See if in substance this was not it: That Mr. Cohen came here and asked you if you were not the owner of that certificate, and you replied that you were; that he then stated to you that he would like to buy it; that he then told you that he did not represent either the owner, tenant or mortgagee, and then you said to him in substance that you did not care who he represented, it was none of your business and asked him "What will you give for it?" A. No, sir; no such conversation took place.

Q. Did you not tell him that the price of the certificate was about $300, what you had asked for it? A. No, sir.

Q. You are sure of that? A. I don't think so.

Q. Did you not then ask him what he would give for it and he said "I will give you $500" and did you not reply to that "I will take it: the certificate is yours?" A. The conversation did not take place in any such way as that, Mr. Johnson.

Q. I am asking you to refresh your recollection. Is it not a fact that after he offered you the $500 and you had said you would accept it, you looked at the paper and said to him "The certificate is now in Washington, at the Central national bank" and Mr. Cohen said to you "The devil it is!" Do you remember that? A. I don't remember any such conversation.

Q. You do not remember that? A. No, sir.

411 Q. Did you not then tell him it had been sent there for redemption and that the party to whom it had been sent had had a week to take it up and had been haggling over the price, and if it had not been redeemed he could have it? A. That part of the conversation is substantially as I gave it before. The certificate had been out for collection about ten or twelve days, and we told them that we were about to recall it if it had not been paid.

Q. Did you not on exam-ing the correspondence say that this man had the opportunity to buy it for ten or twelve days and had been haggling about the price? A. Yes; those facts were stated in the course of the conversation.

Q. Did not Mr. Cohen then suggest to you that you telephone to the bank and ascertain if it had been redeemed and if not to have it sent directly here to you? A. Mr. Cohen asked to have that done during the day—during the time.

Q. That is what you did? A. And I did telephone.

Q. While he was here? A. While he was here.

Q. And you got the answer while he was here that it had not been redeemed? A. Yes, sir.

Q. And that it would be forwarded? A. Yes, sir.

Q. Then after that had been done, did you not authorize Mr. Cohen or send yourself at his expense a telegram to the

412 bank, confirming your telephone? A. I did.

Q. Did you not on that occasion tell Mr. Cohen that you

were going away and would not be at your office on the next day? A. I did.

Q. When the certificate would return, and did you not then tell Miss Watson that when the certificate came, she should deliver it to Mr. Cohen upon his paying her $500 cash? A. I did.

Q. Do you remember what time that day he left your office? A. No, sir; I presume it was along in the afternoon.

Q. You recall telling him you did not expect to be here the next day? A. Yes, sir.

Q. Was that because you were going out of town or because you were going to be occupied in the city away from the office? A. My recollection is I was out of town the following day.

Q. Do you know whether you went that same afternoon or the next morning? A. I think early the next morning, about half past 7 I think I was going to Buffalo for the day. I might have gone that night. I would not be positive about it.

Q. Did you make any note or memorandum of this conversation with Mr. Cohen? A. No, sir.

413 Q. Have you had any special occasion to keep an exact and detailed recollection of what took place between you? A. Yes, sir; I have. I had occasion to do so within a week after the papers left the office. I began to have my suspicions aroused that there was something wrong within ten days after Mr. Cohen obtained the certificate.

Q. What do you mean by something wrong? A. Well, that the certificate had gone into hands where I did not suppose it was going, to be used against the title and against interested parties.

Q. Did Mr. Cohen make any representations to you as to the use he was going to make of it? A. Only for interested parties.

Q. How is that? A. He said he was taking it for interested parties.

Q. Did he make any different statement than that? A. No.

Q. Did he describe in what way they were interested? A. No he did not.

Q. Do you remember after you had heard from the bank in response to your telephone message, Mr. Cohen telling you that he wanted that tax certificate in connection with the matter of a lease in which parties he represented were interested? A. No. It is my recollection that nothing was said in detail as to the nature of the interest which he represented *were interested? A. No. It is my recollection that nothing was said in detail as to the nature of the interest which he represented.* His remarks were general upon that

414 subject, clearly indicating to my mind that there were differences on the part of different interested parties and that he represented some of them. He did not go into details and I did not ask him to.

Q. He did not tell you he represented the tenant? A. No, sir.

Q. He did not tell you he represented the owner? A. No, sir;

he simply said he represented some of the interests; that there were differences.

Q. He did not tell you he represented any mortgagee? A. No, sir; and he did not say it was for himself or any one else, but he took it for interested parties, and the certificate was delivered to him in blank, to put any name in.

Q. Do you not remember saying to Mr. Cohen that it did not make any difference to you what or whom he represented? A. No, sir; he did not make any such statement. I never have sold a certificate out of this office to a stranger to a title, so far as I have known.

Q. What do you mean by a stranger to a title? A. A party who has no interest in the title in any way.

Q. What do you mean by that? A. I mean a man who would take the certificate and hold it as a stranger to the title.

Q. Would you regard an owner as a stranger? A. No, sir.

415 Q. Would you regard a mortgagee as a stranger? A. No.

Q. Would you regard a tenant as a stranger? A. No.

Q. Mr. Cohen did not represent to you that he did not represent any of those parties? *S.* He did not mention any of them at all. He simply said that he represented certain interested parties and that there were differences with reference to the title. Whether they were differences of heirs or of joint owners or what they were I didn't know. I didn't ask him.

Q. You did not seek to find out? A. I didn't seek to find out. He was an attorney and represented himself as such and that he represented interested parties.

Q. If there were two conflicting claimants to a piece of property, and the representative of one of the claimants sought to acquire a tax certificate from you, would that person come within the category of what you consider interested in the title? A. Yes; such a man would be an interested party within the practice in my office.

Q. You do not require them to furnish an abstract of title showing a fee simple title to anybody? A. No, sir; I do not. I am willing to take statements as correct.

Q. Are you sure that you did not look over the papers and tell Mr. Cohen before he made you any offer that the amount

416 due on the certificate was $300 about? A. I think in the course of the conversations that I intimated to him or might have told him, that the amount I had asked King was approximately $300. I think it actually was more than that. It was approximately $300.

Q. And as a matter of fact you were not here when the certificate was actually obtained and delivered to him? A. I was not.

Q. You were not in the city? A. That was done by my cashier.

Q. You did, though, before you left tell him that it had not been redeemed and the bank had agreed to return it to you immediately by that night's mail? A. Yes, sir.

Q. Do you recall being in my office in the city of Washington once? A. I do, Mr. Johnson.

Q. Can you tell us when that was? A. Well, it was several weeks or months after this transaction.

Q. What do you mean by weeks or months? A. I mean what I say.

Q. Which was it; weeks or months? A. Well, both.

Q. How many times were you in Washington after the 1st of October before you were at my office? A. Oh, I don't remember. I might have been there once or twice.

417 Q. Were you there frequently? A. I might have been there once or twice. At some times in the year I am in Washington frequently and at other times not for several months.

Q. Were you in Washington in April 1902? A. I was, and I think that was the time I saw you.

Q. Was not that the time you saw me in the library of my office? A. Yes; that was six months later. That could be several months, and if it was twenty-six weeks that could be several weeks too.

Q. You regard those as equivalent expressions of time? A. Yes, they are both indefinite enough.

Q. Do you recall Mr. Cohen being present on that occasion? A. He was.

Q. Do you recall Mr. Webb being present? A. I don't remember about Mr. Webb.

Q. Do you remember a tall gentleman with a sandy moustache who wore eye-glasses being in the room? A. No. He might have been there and he might not. I don't remember that circumstance particularly.

Q. Do you remember whether there were any other persons there at the time? A. Why, there were one or two persons coming and going there. I don't remember the details of that, Mr. Johnson. I was not very long in your office. I went to see you with Mr. Cohen.

Q. Do you recall on that occasion my showing to your or reading to you the averments of the bill of complaint in this case, such
418 of them as specified the alleged defects in this tax sale? A. I think you did.

Q. And my reading to you briefly the pleadings of one of the defendants, the answer to those suggested defects? A. I don't remember the pleadings or the allegations but I remember you did read part of certain pleadings to me at the time.

Q. I read to you what I represented were the allegations of the complainant as to the specific defects in the tax sale, and also an answer to those? A. You read part of certain pleadings to me, but what they were I don't remember.

Q. Do you recall whether they related to alleged defects of the tax title or not? A. No; I don't remember that specifically.

Q. Do you recall asking me on that occasion whether you would be asked to testify or not in the case. A. I might have asked you; yes.

Q. Let me ask you if you remember this: That I told you on that occasion I did not know of any testimony that would be required of

you unless possibly your testimony might be desired as to this interview between you and Mr. Cohen at your office, and then you stated that you would be willing to give your deposition to that, either in Washington, if you happened to be there, or here, as might be convenient? A. I presume I did.

419 Q. On that occasion do you remember my stating to you what was represented to me to be the substance of the conversation between you and Mr. Cohen, what had taken place between you? A. I don't remember.

Q. And that I stated the conversation between you as having been substantially what I have stated to you to-day? A. I don't remember it so.

Q. Do you think you could say it did not take place? A. It did not take place as you have recited it here in your questions.

Q. I am speaking about my having detailed it to you on that occasion? A. No; I don't remember that; you might have done it and you might not. I don't remember. I do remember that almost the first time I saw Mr. Cohen after he was in Rochester that he and I differed very decidedly as to the conversation in this room at the time he was here. Our memories had differed so soon as that. I show you that card (producing a card) simply as the evidence of his being here and introducing himself as an attorney, and the memorandum I put upon it for my cashier at the time, in consequence of that.

Mr. JOHNSON: Is that card offered in evidence?

Mr. TOBRINER: Yes; I am going to offer it.

Mr. JOHNSON: He offers it himself.

The WITNESS: That is for you gentlemen to say, whether it is offered or not. I simply show it to you.

Mr. JOHNSON: Yes; he produces it and offers it.

Will take if not paid by King at $500.00

MYER COHEN,
Attorney at Law.

926 F street, N. W., Washington, D. C.

420 By Mr. JOHNSON:

Q. The memorandum that was made on this card in writing was made by you? A. Yes; it is my handwriting.

Q. You did not show that to Mr. Cohen at that time? A. I think he saw it; yes. It was written here at this desk as he sat here, and I suppose he saw it.

Q. As a matter of fact, did not Mr. Cohen ask you on that occasion after you had agreed to sell the tax certificate to him for $500, if you would not give him something in writing? A. I think he did ask me for it.

Q. And you declined? A. I declined to do it. I wanted the certificate back in my possession, to be sure I would make the transaction, before I would bind myself to do it.

Q. As a matter of fact, you had sent the certificate to Washington some ten days or more before his visit for redemption had you not? A. I should say about ten days. (After examining papers:) It was sent September 24th.

Q. During that time you had done nothing to prevent Mr. King from taking it up? A. I had not. The papers were at the bank waiting for him to take them up and he had been notified they were there.

Q. Up to the time that you telephoned the bank he could have redeemed it if he had seen fit to do so, so far as anything
421 you did affected it? A. Yes.

Q. Did Mr. Cohen give you any explanation or did you seek any explanation from him of why he offered you $200 more than you claimed on the certificate? A. No, sir. I think he said it was worth that to his client, or something of that kind.

Q. You had never asked any larger sum for the certificate than the amount asked in your original offer to Mr. King, had you? A. No, sir.

Q. And when you sent it to the bank on the 24th of September, you made a concession of about $25 from what you had originally asked? A. Yes, sir. The papers were sent for on September 24th. It was $272.90.

Q. And before that it had been about $296 and some cents? A. Yes; it had just been a little less than $300.

Q. You made a concession of $25 in other words? A. I made a concession of $25; yes.

Q. That concession you never revoked up to the time of recalling the certificate? A. No, sir.

Q. Mr. Cohen made no payment to you that day? A. No, sir.

Q. Nor to anybody for you? A. No, sir.

Q. As I understand you, you would not have accepted the payment then until the certificate actually came into your posses-
422 sion again. Is that right? A. Yes, sir. I would not have accepted the payment. I think he wanted to make a payment or even offered to pay all of it.

Q. But you declined? A. I declined.

Q. So that after you parted on that occasion, you accepting subject to the arrival of the certificate his offer of $500, and his agreeing to pay it, and he having knowledge that there was only $300 due you or claimed by you on it, he could have failed to comply with that the next day, and you would have had no means of compelling him? A. Yes, sir. Let me say that Mr. Cohen did not know at that time the exact amount for which the papers had been sent to Washington. He did not know that they had been sent for $292.90, but in the course of the conversation in that office it is my recollection that I had told him I had offered to let them go out for about $300; but he did not know the exact figures.

Q. He did not know, as a matter of fact, that they were in Washington at all until you told him did he? A. I don't know.

Q. He did not get it from you? A. He did not know from me until I told him so. Whether he knew they were in Washington I don't know.

Q. Did he not exhibit surprise when you told him that? Do you not remember his making use of that remark "The devil they are" when you told him, and expressing surprise? A. I could not
423 testify as to that. I have no recollection upon that matter.

Q. Did he make any suggestion of your telephoning for their recall until you told him they were there? A. No.

Q. In all his conversation and dealing with you until you told him they were there, he behaved and acted and conversed as though he thought you had them in your possession, did he not? A. Yes; I believe he did.

Q. But you do not remember whether he showed any surprise or made any exclamation of surprise when you told him the papers were in Washington? A. No; I don't think he did. He might have; I don't know. Mr. Cohen is quite a fast talker sometimes, and a great many things were talked about here in the course of the hour or so he was here, and during the day.

Re-direct examination.

By Mr. TOBRINER:

Q. Mr. Wiltsie, you say you had a difference with Mr. Cohen about what took place at this interview a very short time after the interview had taken place. About how long was that that you had this difference with Mr. Cohen? A. I think it was the first time I was in Washington.

Re-cross examination.

By Mr. JOHNSON:

Q. First, let me ask you if that was in Mr. Cohen's office
424 on F street? A. Yes, sir.

Q. Do you remember Mr. Adolph Wolf being present at the time? A. Yes, sir; I do.

Q. That was on January 16, 1902, was it not? A. It was during the winter.

Q. Did you not say to Mr. Cohen on that occasion that your understanding was that he represented to you at the time of the purchase that he represented the owner of the property? A. I think so. Mr. Cohen left the impression in my mind and with my cashier when he was——

Q. Do not tell what he represented to the cashier. A. That he represented certain fee title interests. That is the impression it left in my mind.

Q. Observe, Mr. Wiltsie that I am not asking for the impression left on your mind. You have given us that. A. On my direct ex-

amination I testified as to my best recollection. I would not go beyond my best recollection; but now you are going into another subject of a future interview and ask me whether I did not take the position then that he talked about an owner's interest. In conversations with him I might have stated so. Under oath before you to-day I don't know that I will go quite so far as that.

Q. You have already told us the impressions left on your mind, and you have told us as nearly as you can recall what Mr. Cohen actually did say to you when he was here. A. I have tried to.

Q. Now you have been asked on redirect examination by
425 Mr. Tobriner about the differences between you and Mr. Cohen in an interview in Mr. Cohen's office in January? A. Yes, sir.

Q. I am asking you not about what took place in October, but what took place on that occasion in Mr. Cohen's office, and I am asking you if you did not on that occasion state to Mr. Cohen in the presence of Mr. Wolf that you had understood when Mr. Cohen was here in Washington that he claimed to represent the owner of the property? Did you not make that statement to him in January in his office, that you had so understood him? A. No; I don't think I said owner. I said that he had stated to me as attorney that he represented certain interested parties in the property, giving me the impression that they were owners' interests of some character.

Q. I am talking about what you said to Mr. Cohen on that occasion, and not what he said here, but what you said in January in his presence. Did you not then tell him that you understood him to represent to you in the previous October that he represented the owner. Did you not say that to him there? A. I don't think I said owner.

Q. You do not think so? A. I think I said interested parties.

Q. Did not Mr. Cohen then tell you that he had not made any such representation, and recalled to you that if he had represented an owner he would not have offered you $200 more for the certificate than you had actually offered to deliver it to the tenant
426 for? A. Mr. Cohen denied at that time that he had made any representation to me that he represented interested parties. Mr. Cohen had then, as I was informed, taken the certificate in his own name, and taken a deed in his own name.

Q. It is the fact anyway, according to your recollection, that Mr. Cohen did not make any specific representation to you as to who he represented or as to what particular use he was going to make of the certificate? A. He did not state any names and he did not define the character of the interests which he represented for a client.

Q. Nor did he define the use that he intended to make of the certificate? A. No, sir; I don't think he did.

By Mr. TOBRINER:

Q. You had, however, stated to him the rule that was in effect in

your office and that you followed in disposing of these tax certificates? A. I explained that to Mr. Cohen in this office before he took the certificate—one of the rules that had been developed in the business and that was strictly adhered to.

Q. To what extent, may I ask you, inasmuch as you say developed in the business, are you interested in the purchase of tax certificates? A. To a large extent. It is a systematic business.

Q. Appertaining to the District of Columbia alone? A.
427 No; to several cities.

CHARLES H. WILTSIE.

Subscribed by the examiner by consent of counsel.

Miss ELIZABETH J. WATSON, a witness of lawful age, called by and on behalf of the complainant, having been first duly sworn, is examined

By Mr. TOBRINER:

Q. Miss Watson, will you state your name and business? A. Elizabeth J. Watson; Rochester, N. Y.

Q. And your occupation at present? A. Cashier and head clerk.

Q. For whom? A. Charles H. Wiltsie.

Q. In October, 1901, what was your occupation? A. The same.

Q. Do you know Mr. Myer Cohen? A. Yes, sir.

Q. When did you first meet him? A. When he came in the office in October.

Q. In what year? A. 1901.

Q. Were you present at an interview between Mr. Wiltsie and Mr. Cohen about that time? A. During a part of the interview.

Q. Do you recall the day on which the interview took place?
428 A. No, sir not on the day of the week.

Q. I mean the day of the month. A. No; I couldn't recall that.

Q. Can you recall the occasion of that interview? A. Just Mr. Wiltsie calling me in the office to bring the correspondence and tell him what had been done about that certificate.

Q. Can you recall the lot and square? A. No, sir; I could not.

Q. Mr. Cohen was present? A. Yes, sir.

Q. Was it the lot and square which was the subject of negotiation between Mr. Wiltsie and Mr. Cohen at that time? A. Mr. King, you mean?

Q. No; Mr. Cohen. A. Yes, sir.

Q. State what you can of the conversation, as far as you heard it? A. Mr. Wiltsie called me in the office and I brought the correspondence. I told him that the certificate had been sent out for collection and was at the bank.

Q. What was that certificate known as in the office? A. We just called it a tax sale certificate of the King property.

Q. Just continue to state what you recall. A. I think I had stated that I had sent it out on my own recommendation in the matter, he being out of town, and believing that Mr. King would take it
429 up;—not that Mr. King asked me to forward it, but I thought he would take it up and I sent it out at a reduced rate. It had been at the bank beyond the usual time of redemption, and I stated that I was just about to recall it when the matter was brought up between us during the conversation. I said nothing more, and Mr. Wiltsie asked Mr. Cohen if he did not represent interested parties. Mr. Cohen said Yes, and so he said "Well, could I redeem that certificate?" I think Mr. Wiltsie said he could if he paid for it and he kind of smiled, and he says "What will you give it to me for?" Mr. Wiltsie said "Well, I don't know" or something to that effect, and then Mr. Cohen made the offer of $500. At that Mr. Wiltsie and I both smiled, and he said "Well you can have the certificate if it has not been redeemed." Mr. Wiltsie gave me the usual directions about delivering the certificate, as he was going out of town the next day.

Q. What statement, if any, did Mr. Cohen make of his presence in the city? A. I understood from the conversation—he talked very rapidly—that he had been here or was passing through Rochester and just stopped to make inquiries with reference to that certificate; and I took it that it was not his intention to make redemption, but to make inquiry about it.

Q. Did you say Mr. Wiltsie asked Mr. Cohen if he represented interested parties? A. Yes, sir.

Q. And he said that he did? A. Yes, sir.

430 Q. Did Mr. Wiltsie say anything to Mr. Cohen at that time as to a rule which he followed in selling certificates of permitting parties to redeem certificates who were not interested in the title or the property? A. Yes, sir.

Mr. JOHNSON: That is objected to as leading.

By Mr. TOBRINER:

Q. What, if anything, did he say as to that rule? A. Mr. Wiltsie asked him if he represented interested parties. He made the explanation that the reason he asked that question was because it was a rule of the office not to surrender certificates to parties who were not in interest, that is, to strangers; that that was the reason he asked the question if he represented interested parties

Q. Did he or did he not make the statement to Mr. Cohen that that was the rule in the office? A. Yes, sir; he did.

Q. You say that after he had agreed upon the price and Mr. Wiltsie had given you instructions as to the delivery of the certificate—was there anything more done that day with respect to the confirmation of the sale? A. That was in the morning, to my best recollection, because after lunch I am obliged to go to the bank, and I am

out a couple of hours. I don't take care of anything or do anything at all until I do my banking. I was not in the office when Mr. Wiltsie telephoned to the bank.

Q. When did you see him next? A. The next morning.

Q. About what time? A. Between 9 and half past, to my best recollection.

431 Q. Where? A. In my office here. He had been here before that, though, before I had come down.

Q. You do not know that of your own personal knowledge, do you? A. No, sir; but a clerk told me.

Q. What was the name of the clerk? A. I think that was Miss Gammasche. She was an extra stenographer.

Q. Where was it you saw Mr. Cohen? A. In the office.

Q. What, if anything, was said by him to you? A. He asked me if I had received the papers, and I told him no; but I want to state that he had asked a clerk to go to the post office, and she had gone——

By Mr. JOHNSON:

Q. Was that in your presence? A. No, sir.

Q. You do not know that of your own personal knowledge. A. No, sir.

By Mr. TOBRINER:

Q. Do not tell anything except what you know, not what was told you. Did you see Mr. Cohen again after this occasion in the morning when he was advised that the certificate had not as yet been returned? A. Yes, sir.

Q. When? A. I think he came later in the morning and
432 asked me if the mail came in and I told him no.

Q. How often after that did he call? A. I think I told him that the mail would come in at either 12 or 4 o'clock from Washington, and that if it did not come in on the 12 it would at the 4 o'clock, between what we call the 12 and 2 o'clock delivery.

Q. When did you receive the certificate from Washington? A. I went over to the post office with Mr. Cohen at about 2 o'clock.

Q. At whose suggestion did you go to the post office? A. At Mr. Cohen's.

Q. And when you went there at 2 o'clock did you receive the certificate? A. Yes, sir.

Q. What was done then? A. I opened the package and took out the sight draft and went back to the bank with Mr. Cohen.

Q. What bank? A. The Union Trust Company.

Q. What was done there? A. Mr. Cohen wanted to deposit his $500 so he could have a voucher and draw a check, so he could have a voucher to show that he had paid me the money. He did that.

Q. At that time? A. Yes, sir. I introduced him to the cashier of the bank so he could make that deposit, as a matter of convenience.

Q. Then how did he pay you for the certificate? A. He paid me by check drawn on the Union Trust Company.

433 Q. Of Rochester? A. Of Rochester, New York; yes.

Q. Did you deliver to him the certificate? A. I delivered the certificate, signed in blank.

Q. That was, you say, the day after you had had the interview with Mr. Wiltsie? A. With Mr. Wiltsie.

Q. About 2 o'clock in the afternoon? A. Yes, sir.

Q. Have you a regular time to go to your lunch? A. Yes; I do when I am not detained.

Q. What is the usual time for your going to lunch? A. Anywhere from half past 12 to 1 or after.

Q. Can you recall whether on this day there was anything to detain you that you could not go to your lunch in the ordinary, regular time? I mean the day on which Mr. Cohen first had the interview with Mr. Wiltsie? A. Not to my recollection.

Cross examination.

By Mr. JOHNSON:

Q. Miss Watson, I think you have stated you were not in the room during the entire conversation between Mr. Wiltsie and Mr. Cohen? A. I was not.

Q. Only part of the time? A. Yes, sir.

Q. Have you any idea how long you were in the room alto-

434 gether? A. No; I couldn't tell.

Q. Can you tell us whether it was two hours or fifteen minutes? A. Oh, it wasn't two hours.

Q. Was it as much as fifteen minutes? A. Yes, sir; that or more.

Q. Were you in the room half an hour? A. Well, perhaps between fifteen minutes and half an hour.

Q. I think you stated that you brought the correspondence to Mr. Wiltsie and that you stated to him you had taken the liberty in his absence of sending it on for collection to Washington, making some concession about it? A. Yes, sir.

Q. And that it had not been paid. It had been your purpose that day to recall it? Q. Or to notify the parties that they must take it up or I would recall it.

Q. Something to that effect? A. Yes, sir.

Q. What else did you say? A. On that line, do you mean?

Q. Along any line. A. I can't recollect the conversation exactly.

Q. Did you have anything to do with any negotiations with Mr. Cohen? A. No, sir; not until the following day.

Q. I am speaking about that day, at that time. Did you

435 ask any questions of Mr. Cohen? A. No, sir.

Q. Did he ask any of you? A. No, sir.

Q. Did you make any statements to him? A. No, sir.

Q. Did he make any statements to you? A. No, sir.

Q. What were you doing then beyond what you have told us you

did, that is giving these papers to Mr. Wiltsie and making the statements you have detailed. Did you have any other connection with it at all? A. With that matter?

Q. Yes. A. No, sir.

Q. And you remained the rest of the time simply doing nothing in the room. Is that it? A. Why, listening to the conversation that was had between him and Mr. Wiltsie.

Q. That is what I want to know. You stayed there the rest of the time? A. Yes and listened to the conversation between he and Mr. Wiltsie.

Q. Did you see Mr. Cohen here that day more than once? A. I don't recollect whether I did or not—whether it was more than once or not.

Q. Do you remember having seen him come here more than once? You did see him come here once? A. Yes, sir.

436 Q. And what you have told us took place? A. Yes, sir.

Q. Now did you see him come again? A. Not to my knowledge. I was at the bank then.

Q. After you left the room on that occasion of the conversation between him and Mr. Wiltsie, did you leave Mr. Cohen in here? A. Yes, sir.

Q. Did you see him go out? A. I don't recollect that.

Q. Have you any recollection of seeing him come back? A. No, sir.

Q. Have you any recollection of having seen him come to the office before that time? A. In the morning, when he first came in.

Q. Then you do remember his coming here twice that day? A. No; you asked me if I had any recollection before that. I said when he first came in I recollect him coming in the office.

Q. You recollect the first time you saw him? A. The first time I did.

Q. That was the occasion when what you have described took place here? A. Yes.

Q. Before that, have you any recollection of seeing him come to the office? A. I just answered that question.

437 Q. I want to ask my question very daintily then and see if we cannot make it plainer. You stated you came in here on a certain occasion and brought those papers and saw Mr. Cohen here on that occasion? A. Yes, that is right.

Q. How long had he been here then? A. Perhaps ten or fifteen minutes.

Q. Did you see him when he came? A. Yes, sir.

Q. At any time before that ten or fifteen minutes when he came here, had you seen him in this office? A. No, sir.

Q. Had you ever seen him in this office at any other time than that day? A. No, sir.

Q. Did you ever see him in this office at any subsequent time that day? A. I can't recollect that.

Q. You left him in this room with Mr. Wiltsie? A. Yes, sir.

Q. What became of you? A. I think I must have gone to lunch.
Q. You do not know certainly? A. No.
Q. At all events you were out. You did not see Mr. Cohen leave? A. No, sir.
Q. You did not see him any more that day? A. I won't say for sure about that. I say I can't recollect whether I did or not.
438 Q. Did you occupy the room in which the telephone is situated? A. Yes, sir; I always do.
Q. Were you present at the time they were telephoning to the bank? A. No, sir; I was not.
Q. Do you remember Mr. Wiltsie telling you that if that tax certificate came here from Washington on the next day, you should deliver it to Mr. Cohen upon his paying you $500 cash? A. Yes; that is when Mr. Wiltsie made that memorandum.
Q. That is here? A. Yes, sir.
Q. At that time he had not telephoned as far as you know? A. No; I think that was in the afternoon that he told me that.
Q. And it was not at the time that Mr. Cohen was here? A. I think he told me that too, but he gave me explicit directions about the matter before he went away, and that was late in the afternoon.
Q. That was after Mr. Cohen had gone? A. Yes; he had told me before I left the room if the papers had not been redeemed I should deliver them to Mr. Cohen upon payment of the money.
Q. That was while Mr. Cohen was here? A. It was in his presence he told me that, and later on in the afternoon——
439 Q. At that time you did not know he had telephoned to the bank? A. He had not at that time.
Q. Did you have any regular hour for going to the bank? A. Yes, sir.
Q. What is the hour? A. Anywhere from half past 2—between that and 4 o'clock.
Q. Any particular bank or several banks? A. Several banks.
Q. What are the banking hours here? A. From 3 to 4. That is they close between 3 and 4. From 9 in the morning until 3 in the afternoon, and from 10 until 4.
Q. The national banks close at 3, do they? A. Yes, sir.
Q. And the other banks at 4? A. At 4.
Q. Do you have to go to the bank every day? A. Yes, sir.
Q. How long does it take you generally? A. Well, anywhere from half past 2 to half past 3 or nearly 4. It depends on how much I have to do.
Q. I want to get at the average. It is about an hour's work, is it? A. Yes, sir, or more.
Q. It averages an hour? A. Yes, sir.
440 Q. So that on that occasion you think you were out at least an hour? A. Yes, sir.
Q. On the following day, when you went with Mr. Cohen to get this certificate from the post office, is it not a fact that you first went to the trust company, introduced him, had him make the deposit

and got the certified check and from there to the post office, and at the post office he left you and hurried to the train? A. Yes, sir.

Q. He was trying to catch a particular train to New York, was he not? A. Yes.

Q. The Empire express? A. Yes, sir.

Q. That left at about 2:20, did it not? A. Yes.

Q. And what time did the mail get in? A. The mail came in about 2 or a little before.

Q. Do you remember having gone to some official there and had him open the pouch and get this mail for you? A. Yes, sir.

Q. That was in order to enable Mr. Cohen to catch the train, was it not? A. Yes, sir.

Q. So that he must have gone to the bank with you first and from there to the post office. Is not that the way of it? A. Yes;

441 that is my recollection.

Q. Because he would not have had time to catch the train and go back to the trust company's. Is that right? A. That is right.

Q. You stated that when you came in here you understood Mr. Cohen to ask Mr. Wiltsie if he could redeem that certificate. Did he not ask Mr. Wiltsie if he could buy it, or if he, Mr. Wiltsie, would sell it to him? A. I don't recall that those were the exact words.

Q. You do not recall either that he used the exact word "redeem" there, do you? A. No, sir; not that.

Q. That is simply your own expression? A. My own expression.

Q. When you delivered the certificate to Mr. Cohen it was endorsed in blank, was it not? A. Yes, sir.

Q. Did you know those certificates were assignable? A. Certainly.

Q. You knew they could be sold to anybody? A. Yes, sir.

Q. You knew they could be sold to me and I could sell them to somebody else and that person sell them to another? A. Yes, sir.

Q. Like any other piece of property? A. Yes, sir.

Q. You did not yourself cancel it or require any cancelation of it? A. No, sir.

442 Q. Do you remember whether you prepared it for sending it to Washington at the time it was sent to the bank? A. No; I gave instructions to a clerk to prepare it.

Q. Did you have to do anything to it after it came back? A. From the national bank?

Q. Yes. A. No, sir; I just examined it to see if it was proper.

Q. And delivered it to Mr. Cohen as it was? A. Yes, sir; after detaching, of course, the papers that were on it.

Q. That was a sight draft on King? A. Yes, sir.

Q. I believe you are the principal clerk, having responsible charge of the business of the office? A. I am.

Q. And in Mr. Wiltsie's absence you are in entire charge? A. Yes, sir.

Q. You have a very considerable volume of business? A. I do.

Q. And business of that character? A. Yes, sir.

Q. Many hundreds of those certificates? A. Yes, sir.
Q. And many thousands perhaps? A. Yes, sir.
443 Q. You did have at that time? A. Yes, sir.

Redirect examination.

By Mr. TOBRINER:

Q. Miss Watson, because of the fact that you were the cashier and managing clerk for Mr. Wiltsie, you remained during the conversation between Mr. Wiltsie and Mr. Cohen. Is not that so?

Mr. JOHNSON: I object to that as leading.

A. I remained during part of the conversation after Mr. Wiltsie called me in, until my directions were given to me.

Q. You remained until you had received instructions? A. Received instructions from Mr. Wiltsie.

Q. When was the deposit made in the Union Trust Company by Mr. Cohen; how long before you went to the post office with him? A. Just before. We did that so that we would have time and get his train in case the certificate was there. He understood from my conversation that I could not take his money until I could deliver the certificate, and he took and got the check ready to deliver to me when I gave him this certificate.

Q. So that he made the deposit at the bank? A. Yes.

Q. Simply taking the chance that he would be able to use the check if the certificate came? A. Yes; and save time.

Q. Miss Watson, when the party in interest or the owner of the property pays up the amount that is due on the certificate
444 to your office or to Mr. Wiltsie, what is the course pursued in disposing of that certificate? A. Why, if they direct an assignment, we make it to whoever they say. If not, it is customary to leave it in blank.

Q. What is done with the certificate them? A. It is sent on to the bank for collection just as it is.

Q. What does the bank do with it? A. The bank delivers it to the party, upon payment.

Q. Of the amount due on it? A. Of the amount due.

ELIZABETH J. WATSON.

Subscribed by the examiner by consent of counsel.

445 *Memoranda.*

For Exhibit A see page 12.
" " B " " 15.
" " B^2 " " 17.
" " C " " 18.
" " D " " 19.
" " E " " 19.
" " F " " 20.
" " G " " 21.
" " H " " 22.
" " H. R. W. No. 1 see page 86.
" " " " " " 2 " " 86.
" " " " " " 3 " " 86.
" " " " " " 5 " " 87.
" " " " " " 6 " " 87.
" " " " " " 7 " " 89.

Year.	To whom assessed.	Sq.	Lot.	Val. lot.	Val. imp.	Tot. val.	Tax.	Day book.	By whom paid.	Date payment.	Am't pd.
			Of 3	1.080							
1890-1	Maria T. Gillis.	432	S. A.	11.634	6.000	18.714	$280.71	46/455	Swormstedt & Bradley.	May 29-1891	$140.35
								51/240	Do.	Nov'r 30-1891	140.36
1891-2	Do.	Do.	Do.	Do.	Do.	Do.	Do.	50/294	Do.	May 31-1892	140.35
								55/29	Do.	Nov'r 16-1892	140.36
1892-3	Do.	Do.	Do.	Do.	Do.	Do.	Do.	53/280	Do.	May 31-1893	140.35
				1.260				60/21	No record	Nov'r 29-1893	147.94
1893-4	Do.	Do.	Do.	12.465	Do.	19.725	295.88	60/228	Swormstedt & Bradley.	May 31-1894	147.94
1894-5	Do.	Do.	Do.	Do.	Do.	Do.	Do.	65/25	Do.	May 31-1895	295.88
								70/217	Do.	Nov'r 30-1895	147.94
1895-6	Do.	Do.	Do.	Do.	Do.	Do.	Do.	70/230	R. E. Bradley, ag't.	May 29-1896	147.94
				1.260				75/29	Do.	Nov'r 30-1896	137.96
1896-7	Do.	Do.	Do.	11.634	5.500	18.394	275.91	75/47	Do.	May 29-1897	137.95
	Kennedy, J. C.		Of 3	96							
1890-1	and M. A. B.	432	S. 5	354		450	6.75	46/455	Swormstedt & Bradley.	May 29-1891	3.37
								51/240	Do.	Nov'r 30-1891	3.38
1891-2	Do.	Do.	Do.	Do.	Do.	Do.	Do.	50/294	Do.	May 31-1892	3.37
								55/29	Do. of 5	Nov'r 16-1892	2.66
									Do.		3.38
1892-3	Do.	Do.	Do.	Do.	Do.	Do.	Do.	53/280	Do.	May 31-1893	3.37
				112				60/21	No record	Nov'r 29-1893	3.17
1893-4	Do.	Do.	Do.	310	Do.	422	6.33	60/228	Swormstedt & Bradley.	May 31-1894	3.16
1894-5	Do.	Do.	Do.	Do.	Do.	Do.	Do.	65/25	Do.	May 31-1895	6.33
1895-6	Do.	Do.	Do.	Do.	Do.	Do.	Do.	70/231	R. E. Bradley.	May 29-1896	6.33
								75/29	Do.	Nov'r 30-1896	3.17
1896-7	Do.	Do.	Do.	Do.	Do.	Do.	Do.	75/47	Do.	May 29-1897	3.16

447 EXHIBIT D. W. No. 1.

No. 3584. WASHINGTON, D. C., *May* 26*th*, 1891.

National Metropolitan Bank of Washington, D. C.,

Pay to the order of M. A. B. Kennedy one hundred and forty dollars.
$140.00 / 100 H. KING, JR.

(On margin:) Henry King, Jr. King's Palace.
(Written across face:) Paid May 28, 1891.
(Endorsed:) M. A. B. Kennedy Swormstedt & Bradley.
(Bank stamp.)

EXHIBIT D. W. No. 2.

No. 777. WASHINGTON, D. C., *Nov.* 14*th*, 1891.

Lincoln National Bank of Washington, D. C.,

Pay to the order of M. A. B. Kennedy one hundred and forty dollars.
$140.00 / 100. H. KING, JR.

(On margin:) Henry King, Jr. King's Palace.
(Endorsed:) M. A. B. Kennedy.
(Bank stamp.)

448 EXHIBIT D. W. No. 3.

No. 1051. WASHINGTON, D. C., *May* 16*th*, 1892.

Lincoln National Bank of Washington, D. C.,

Pay to the order of M. A. B. Kennedy one hundred and forty 00 / 100 dollars.
$140.00 / 100

H. KING, JR.,
Per HARRY KING, *Att'y.*

(On margin:) Henry King, Jr. King's Palace.
(On face:) Lincoln national — Washington, D. C. Paid May 16, 1892
(Endorsed:) M. A. B. Kennedy.
(Bank stamp.)

EXHIBIT D. W. No. 4.

No. 5621. WASHINGTON, D. C., *May 20th*, 1893.

National Metropolitan Bank of Washington, D. C.,

Pay to the order of — A. B. Kennedy one hundred and forty 00 dollars for taxes.

$140.00 H. KING, JR.

(On margin:) Henry King, Jr. "King's Palace."
(On face:) P. T. Paid May 23, 1893.
(Endorsed:) M. A. B. Kennedy. Endorsement of M. A. B. Kennedy satisfactory. H. King, Jr.
(Bank stamp.)

449 EXHIBIT D. W. No. 5.

No. —. WASHINGTON, D. C., *May* 31, 1894.

The National Metropolitan Bank of Washington

Pay to M. A. B. Kennedy or [bearer]* order one hundred & forty seven 94/100 dollars.

$147.94/100. H. KING, JR.

(On face:) Paid Jun- 1, 1894.
(Endorsed:) M. A. B. Kennedy.
(Bank stamp.)

EXHIBIT D. W. No. 6.

No. 8. WASHINGTON, D. C., *May* 31*st*, 1895.

Lincoln National Bank of Washington, D. C., cor. 9th & D Sts.,

Pay to the order of Mrs. M. A. B. Kennedy $295.88/100 two hundred & ninety five 88/100 dollars.

H. KING, JR.

(On face:) Paid.
(Endorsed:) M. A. B. Kennedy.
(Bank stamps.)

[* Word enclosed in brackets erased in copy.]

450 EXHIBIT D. W. No. 7.

No. —. WASHINGTON, D. C., *Nov.* 22, 1895.

Lincoln National Bank of Washington, D. C., cor. 9th & D Sts.,

Pay to the order of Mrs. M. A. B. Kennedy $140.00 one hundred, fourty 00/100 — taxes.

H. KING, JR.

(On face:) Paid.
(Endorsed:) M. A. B. Kennedy.
(Bank stamps.)

EXHIBIT D. W. No. 8.

No. 2645. WASHINGTON, D. C., *May* 28, 1896.

Lincoln National Bank of Washington, D. C., cor. 9th & D Sts.,

Pay to the order of Mrs. — A. B. Kennedy $147.00/100 one hundred and forty seven 00/100 dollars.

H. KING, JR.

(On face:) Paid.
(Endorsed:) M. A. B. Kennedy. For deposit only Credit account R. E. Bradley, agent.
(Bank stamp.)

451 EXHIBIT D. W. No. 9.

No. 3597. WASHINGTON, D. C., *Nov.* 30, 1896.

Lincoln National Bank of Washington, D. C., cor. 9th & D Sts.,

Pay to the order of R. E. Bradley $143.42 one hundred forty three 42/100 dollars taxes first 1/2/97.

H. KING, JR.

(On face:) Paid.
(Endorsed:) Pay to the order of the Traders nat'l bank R. E. Bradley, ag't.
(Bank stamp.)

EXHIBIT D. W. No. 10.

No. 4526. WASHINGTON, D. C., *May* 29, 1897.

Lincoln National Bank of Washington, D. C., cor. 9th & D Sts.,

Pay to the order of M. A. B. Kennedy $143.42/100 one hundred. forty-three 42/100 dollars, taxes 715 Market space.

H. KING, JR.

(On face:) Paid.
(Endorsed:) M. A. B. Kennedy.
(Bank stamp.)

452 EXHIBIT RODGERS No. 1.

No. 5424. WASHINGTON, D. C., *July 24th*, 1900.

Lincoln National Bank of Washington, D. C., cor. 7th & D Sts.,

Pay to the order of collector of taxes D. C. $281.83 two hundred & eighty one 83/100 dollars. All of 1900. Taxes on 715 Market space for M. A. B. Kennedy.

CAROLINE KING & SONS.

(On margin:) *K.* King, Jr. King's Palace 812–814 7th street N. W. Caroline King & Sons, prop's.
(On face:) Paid.
(Bank stamp.)
(Endorsed:) E. G. Davis, collector taxes D. C.
(Bank stamp.)

453 EXHIBIT RODGERS No. 2.

NOTICE.—This bill is for the tax year from July 1, 1899, ending June 30, 1900.

Pay to the collector of taxes, D. C.

First half of tax payable in November, 1899, one per cent. penalty on the first day of December, 1899, and a like penalty on first day of each succeeding month. Second half payable in May, 1900, one per cent. penalty on the first day of June, 1900, and a like penalty on the first day of each succeeding month.

1900. *Taxes Year Ending June* 30. 1900.

Washington city.

Tax, $1.50 per $100 assessed valuation.

Folio 62.

ASSESSOR'S OFFICE, *July* 24", 1900.

Maria T. Gillis to the District of Columbia, Dr.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.
432	Of 3 S. A	$1260 11634	$5000	$17894

{ Collector of taxes, Paid Jul- 24, 1900, District of Columbia. }

To all of tax	$268.41
To penalty of 5 per cent	13.42
Advertising	
Total	$281.83

Received payment, E. G. DAVIS,
Collector, D. C.

(Written on face:) Caroline King & Sons.
(On margin:) For further description of property, see records and plats.

454 EXHIBIT RODGERS No. 3.

(2c. I. R. stamp.)

No. 7923. WASHINGTON, D. C., *May* 24, 1901.

Lincoln National Bank of Washington, D. C., cor. 7th & D Sts.,

Pay to the order of collector of taxes $268.41/100 two hundred & sixty-eight 41/100 dollars

CAROLINE KING & SONS.

All 1901. Branch store.

(On margin:) H. King, Jr., King's Palace 810–812 7th street N. W. Caroline King & Sons, prop's.
(On face:) Paid.
(Bank stamp.)
(Endorsed:) E. G. Davis, collector of taxes, D. C.
(Bank stamp.)

455 EXHIBIT RODGERS No. 4.

Office of the assessor, D. C.

NOTICE.—This bill is for the tax year from July 1, 1900, ending June 30, 1901.

Pay to the collector of taxes, D. C.

All of tax payable in May, 1901. One per cent. penalty on the first day of June, 1901, and a like penalty on the first of each succeeding month.

1901. *Taxes for Year Ending June 30.* 1901.

Washington city.

Tax, $1.50 per $100 assessed value.

Folio 62.

Maria T. Gillis transferred to —— —— to the District of Columbia, Dr

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.
A* 432..... Branch store.*	Of 3 S. A.	$1260 11634	$5000	$17894

[* In red ink in copy.]

{ Collector of taxes, Paid, May 24, 1901, District of Columbia. }

To all of tax..... $268.41
To penalty of — per cent. .....
Advertising .....

Total..... $

Received payment,

E. G. DAVIS,
Collector, D. C.,
By J. M.

36—1456A

(On margin:) General taxes in arrears will be reported on
456 the back of this bill. For further description of property see records and plats.

(On back:) General taxes due and in arrears as follows: penalties and interest to be added at date of payment. (Bills furnished in room 3, basement floor.)

Square.	Lot.	To whom assessed.	Year taxes.
		Blue (A) on face of this bill indicates the tax for 1900 is unpaid. Red (A) indicates general taxes unpaid prior to 1900. (W) indicates unpaid water main tax.	

457 EXHIBIT RODGERS No. 5.

Pt. of Branch 2″ 1 / 2 1898.

Washington city, 1898.

ASSESSOR'S OFFICE,
DISTRICT OF COLUMBIA, *May* 24, 1901.

Items of Sale.

To 2d h'f of tax for year ended June 30, 1898	$9.45
To penalty	1.04
To advertising	1.20
Amount sold for	$11.69

1898 Tax Book, folio 270.

Of lot 3, square No. 432.

{ Collector of taxes, Paid May 24, 1901, District of Columbia. }

To amount sold for taxes, April 13, 1899, assessed in name of Maria T. Gillis	$11.69
Interest at the rate of ten per cent. per annum from day of sale to date of redemption	2.4- (torn)
Amount required to redeem	$14.1- (torn)

Received payment, E. G. DAVIS, *Collector*,
By J. W. W.

458 EXHIBIT RODGERS No. 6.

1899.

Tax Sale Redemption Bill.

Sales Book No. 7, fol. 184.

ASSESSOR'S OFFICE, D. C., *May* 24, 1901 *190–*.

Description of Property.

Square 432, sub. lot A.

{ Collector of taxes, Paid May 24, 1901, District of Columbia. }

	$ cts.
Assessed in name of Martha T. Gillis.	
Sold for taxes Ap'l 12 1900 to C. M. Wiltsie in amount of..	296 22
Interest at rate of 15 per cent. per annum from day of sale to date of redemption.....	49 62
Recording	10
	$345 94

Branch 1899.

Received payment,

E. G. DAVIS,
Collector, D. C.,
By J. W. W.

459 EXHIBIT RODGERS No. 7.

Branch, 1899.

Washington city, 1899.

ASSESSOR'S OFFICE,
DISTRICT OF COLUMBIA, *May* 24, 1901.

Items of Sale.

To all of tax for year ended June 30, 1899.....	$18 90
To penalty.....	2 65
To advertising.....	1 20
Amount sold for.....	$22 75

{ Collector of taxes, Paid May 24, 1901, District of Columbia. }

1899 Tax Book, folio 269.

Of lot 3, square No. 432.

To amount sold for taxes, April 12, 1900 assessed in name of Mariah T. Gillis	$22 75
Interest at the rate of ten per cent. per annum from day of sale to date of redemption	2 54
Amount required to redeem	$25 29

Received payment, E. G. DAVIS, *Collector*,
By J. W. W.

E. L. G.

460 EXHIBIT RODGERS No. 8.

(I. R. stamp.)

No. 7925. WASHINGTON, D. C., *May* 24, 1901.

Lincoln National Bank of Washington, D. C., cor. 7th & D Sts.,

Pay to the order of collector of taxes, D. C., $385.39/100 three hundred & eighty five 39/100 dollars.

CAROLINE KING & SONS.

[On face:] Paid.
(On margin of check:) H. King, Jr. King's Palace, 810-812-814 7th street N. W., Caroline King & Sons, props.

Endorsed.

" " all 99
25.29

Lot A all 99
245.94

E. G. DAVIS,
Collector of Taxes, D. C.

(Bank stamp.)

461 RODGERS No. 9.

Charles H. Wiltsie, attorney and counsellor, 820 Powers' bldg.

Serial No. 909, Wash., '99.

ROCHESTER, N. Y., *July* 24, 1901.

M-. Caroline King.

DEAR MADAM: At the tax sale held in April, 1899, at the District building, Washington, D. C., by the collector of taxes, there *was* sold to me the lands and premises described as sub. lot A, square 432 assessed in the name of Maria T. Gillis.

The right to make redemption through the office of the collector of taxes, expired last April, and settlement must now be made directly with me. I am willing to surrender the tax certificate and to cancel my claim upon a very reasonable basis, if you give the matter immediate attention. Delay will increase the charges against you.

I paid for the certificate in April 1899.....	$143.83
There is to be added interest at the statutory rate of 15 % per annum, from April 1899, to date of payment, 2 years and 4 months.....	$
Charge for releasing which I will state definitely as soon as I know that you are the owner, or otherwise interested.....	$
Total.....	$

462 Immediate payment and settlement should be made. I am now entitled to a deed to the property; but I will surrender the tax certificate without obtaining a deed, if you will give this matter immediate attention. Delay will be entirely at your own risk.

If I do not hear from you *within ten days*, I shall conclude that you have no interest in the property and have abandoned it, and shall consider myself at liberty to take title to the property by deed.

Answer at once by enclosed envelope. *This notice is sent only as an act of courtesy.*

Respectfully yours, C. H. WILTSIE.

P. S.—I am informed that you are interested in the premises as owner or mortgagee. If I am wrongly informed, I shall esteem it a favor if you will kindly state that fact and give me the name and address of some interested party.

463 *Testimony on Behalf of Defendants.*

Filed May 9, 1904.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } In Equity. No. 22834.

Testimony on behalf of the defendants.

WASHINGTON, D. C., *November 2nd*, 1903—8 o'clock p. m.

Met pursuant to agreement at the office of Wolf & Cohen, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendants, Messrs. Cohen and Kann, Mr. Johnson.

Present on behalf of the defendant, W. Randall Webb, Mr. Perry.

Present on behalf of the defendant Dewey, Mr. Bradley.

HENRY RANDALL WEBB, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined,

By Mr. PERRY:

Q. What is your name? A. Henry Randall Webb.

Q. Are you the same Henry Randall Webb who is named
464 as defendant to the supplemental and amended bill in this case? A. I am.

Q. Did you know the late Marianne A. B. Kennedy, one of the defendants to the original bill? A. Very well, indeed.

Q. Were you acting as her counsel in the year 1901? A. I was.

Q. Do you know the premises in controversy here, being described as 715 Market space? A. Yes. I know them slightly.

Q. When did you first learn that those premises had been sold for taxes, and that a certificate for said sale had been issued and had become irredeemable? A. I first learned that the property had been sold for taxes on the 25th day of September, 1901.

Q. How did you learn it? A. A man by the name of Charles H. Knight (I think that is his name) called upon me about 3 or half past 3 in the afternoon of that day.

Q. What did you do thereupon? A. The first thing I did, after

a short conversation with Knight, was to call at the house of Mrs. Kennedy that evening to ascertain whether she was in town or not. I found she was, and I made an engagement with her.

Q. I do not care for the details of that. Did you have a consultation with her? A. Not that evening, no.

465 Q. You did not have a consultation with her that evening? A. No.

Q. What happened next? A. The next thing, I visited the tax office the next day and ascertained that the statements made to me by Knight were true. I think it was then that I found out the tax was irredeemable.

Q. What next? A. That afternoon about 4.30 I called upon Mrs. Kennedy and informed her of the fact.

Q. One moment. You called upon Mrs. Kennedy? A. Yes.

Q. Did you have a consultation with her? A. Yes, I had a consultation with her. I laid the facts before her.

Q. What did you do in consequence of that consultation? A. I did nothing at that time.

Q. What happened next in this connection? A. The next thing that happened was that on the 27th of September, which was Friday, I was called to New York and I wrote her a short note.

Q. It is not necessary to say anything further about that. What happened next? A. The next thing that happened was on the 30th day of September.

Q. This is the same year always, you are talking about,

466 1901? A. Yes; 1901. I came back to my office that morning, and I found a letter from Mrs. Kennedy.

Q. What next? A. The next thing I did was to see Mr. Myer Cohen and ask him if his clients, Kann Brothers, would take that store at $300 a month rent if we were able to rent it to them.

Q. You say "that store." What do you mean by that? A. I mean 715 Market space.

Q. What next? A. Mr. Cohen informed me that he would ascertain for me whether they would take it or not. He called at my office the same day——

Q. One moment. When you say Mr. Myer Cohen, you mean Mr. Myer Cohen who is the co-defendant? A. Yes, who is the co-defendant. He came to see me on the same day at my office, about one o'clock, I think, and said they would take it if we could deliver possession.

Q. In that connection let me ask you why you went to see Mr. Cohen? A. Mr. Cohen was the counsel of the Kanns, and I went to see him as a more convenient way of communicating with the Kanns.

Q. What reason had you to suppose that the Kanns would take a lease of these premises? A. I knew the Kanns very slightly; and once, in talking about this store, as they knew I was Mrs.

467 Kennedy's attorney, one of the Kanns said to me casually that they would take the store and pay Mrs. Kennedy $300 a

month for it and all expenses. At that time nothing further was said about it.

Q. How long before this month of September 1901 was this casual conversation with one of the Kanns? A. I think it was some time in the month of June, 1901.

Q. Now, just resume your narrative, if you please? A. Having obtained that fact from Mr. Cohen, that afternoon, on the 30th of September, I went up to see Mrs. Kennedy and laid the whole situation before her.

Q. You need not go into anything that was said between you there, but just state what you did in consequence of it? A. I saw Mrs. Kennedy that afternoon about half past four.

Q. What happened next? A. Later in the afternoon, about 6 o'clock, I reached my house, and I found Mr. Cohen and Mr. Wolf standing on the front door step.

Q. As this is the first time you have mentioned Mr. Wolf, please identify him? A. Mr. Adolph Wolf.

Q. The partner of Mr. Cohen? A. Yes. Shall I go on?

Q. Go on. A. Mr. Cohen said to me, "I have come to tell you that I am going to Rochester to buy that tax title, and we
468 now shall deal at arm's length." I asked him not to do that, and he insisted upon going, and I said "I see no way to prevent it." I then said that I did not want him to go because he acted on information which he had obtained from me. He then informed me that he had not learned this fact from me, but that Mr. Knight had been to see the Kanns before he came to see me and told them about it, and he also said they had sent Knight to me, which Knight subsequently confirmed.

Mr. DARLINGTON: I move to strike out all about Knight's subsequent confirmation.

Mr. PERRY: Yes; there is no objection to that. It is no evidence.

By Mr. PERRY:

Q. Go on, Mr. Webb. A. The next thing that occurred was I had a visit from Mr. Harry King on the 2nd day of October, 1901. Mr. King came in about 10 or half past 10 and sat down, and said to me he had received a letter from Mrs. Kennedy and he was very much surprised to receive it, and asked me what it meant. I told him it meant that they had forfeited their lease for the non-payment of taxes and that Mrs. Kennedy had determined to forfeit the lease for that reason. We had a talk about various matters, and I think there was very little said except that I told him Mrs. Kennedy had decided to forfeit the lease.

Q. You speak of Mr. Harry King. Do you mean the gentleman who testified in this case? A. Yes, I mean the gentleman
469 who testified in the case.

Q. Had you more than one conversation with him upon this same subject matter? A. Only that one.

Q. What date did you say that was, as near as you can recollect? A. The 2nd day of October, 1901.

Q. I would ask you whether you then and there said to Mr. Harry King that the lease had been forfeited for the non-payment of taxes in 1897, and that you were very glad of it? A. I made no remark about being very glad of it at all.

Q. Did you on any occasion or at any place, use any such language to Mr. King? A. No, sir.

Q. Did you say that you were delighted and pleased to hear it? A. I did not.

Q. I would ask you whether or not on that occasion any such conversation as this occurred between Harry King and yourself: "I (that is, Mr. Harry King) then said 'Mr. Webb (meaning you) this is not fair treatment. The relations between Mrs. Kennedy and my mother have always been very friendly, and in fact the relations with all of us have been friendly; and this is no way to treat us.' I said 'We had that lease down on the Avenue when it was not worth the rent it is now, and because trade conditions
470 have changed and made that lease more valuable is no reason why we should be squeezed.' I also told him in that conversation that I wanted him to understand that we would not waive any of our rights with reference to the lease. Mr. Webb said that Mrs. Kennedy would make a new lease with us for an increased rental but would not make it for a long term of years. I asked him what he meant by an increased rental and whether he proposed to take that property to every merchant and to hawk it around and put it up to the highest bidder. He told me that he was going to get all the money out of it he could. I then said: 'Mr. Webb, we are not being treated right. It is not fair. We are paying a good rent for that store. 717, on the right-hand side, Mr. Kann gets, and they only pay $150 a month for the store, to my knowledge.' That was a longer store than mine. He then asked me what they paid for the Johnson & Luttrell store, which is No. 713 Market space. I told him I did not know exactly, but I thought they paid in the neighborhood of $3,000 a year rent. That was from what I had heard on the street. The store was much wider than ours, and much longer, and it had an ell to it. It was a much finer building. When I asked Mr. Webb again what he meant by making a new lease to us, he said 'Well, I will see Mrs. Kennedy and we will talk the matter over, and I will let you know what arrangement and what kind of a lease we will make with you.' I again told him there would be no waiving of our rights in the matter of a lease, and that we did not propose to consider it a forfeiture; that we had not wilfully, at any time, neglected to pay taxes on the property. I then said 'Mr. Webb, have you any objection to my going to see Mrs. Kennedy?' He said 'I prefer that you should not go to see her. You can transact all your business with me.' I went to the door and as I

went out I said 'Mr. Webb, I am going to see Mrs. Kennedy.'"
471 Will you state how much of that conversation occurred between you and Mr. Harry King on that occasion? A. It is so long ago I can't remember exactly all the conversation that occurred. I think a great part of that conversation did occur between Mr. King and myself; but I think there are some things in there that did not occur at that interview.

Q. And you had no other, you say? A. No, I mean not with Mr. King. I have talked about those matters. Mr. King did speak about not treating them fairly. I remember that. I do not think he mentioned his mother's name at all. I think he referred entirely to himself. He did ask me something about a new lease, and if I told him anything about it I told him that——

Mr. DARLINGTON: I object to a hypothetical statement.

By Mr. PERRY:

Q. Give your best recollection of the conversation. A. My best recollection is that I told Mr. King that if we made another lease with him it would be for a shorter term and for more rent.

Q. How long a time did the conversation between you two on that occasion take? A. It was a very short conversation. I don't think it took more than fifteen minutes at the longest.

Q. You say Mr. King did not mention his mother's name? A. I don't recollect.

Q. Had you any knowledge yourself as to who in fact was
472 conducting that business at that time? A. I always understood and always regarded Mr. King as the manager.

Mr. DARLINGTON: I object to the question and to the answer.

A. I will say that Mr. King always seemed to act as if he was the manager of the business down there, I always regarded him as such.

Mr. PERRY: I admit that how Mr. Webb regarded him would not be evidence, Mr. Darlington. I have no objection to that being stricken out.

By Mr. PERRY:

Q. You can give what your knowledge was about it, Mr. Webb. I think that is perfectly competent,—why you so regarded him. A. Well, I had had conversations with Mr. King about this property prior to that, and Mr. King always acted as if he was the manager of the business.

Mr. DARLINGTON: I again object to this as not evidence.

By Mr. PERRY:

Q. Now just take up your story again at this point and go on. You say this is the only conversation you ever had on this subject with Mr. Harry King. What happened next? A. The next

thing I remember was a visit on the next day, on the 3rd of October, from Mr. Tobriner.

Q. You say Mr. Tobriner. Whom do you mean? A. Mr. Leon Tobriner.

Q. Who has testified in this case? A. Yes.

473 Q. What happened between Mr. Tobriner and yourself on that occasion? A. Mr. Tobriner called to ask me two questions. In the first place, he wanted to know if Mrs. Kennedy was in earnest about declaring this lease forfeited. I told him she was. He then asked me if we had redeemed the tax sale, and I told him that I had not redeemed it. Then he seemed to be somewhat embarrassed and asked me who had redeemed it, if I knew. I told him I thought Mayer Cohen had done it. Shall I use his words?

Q. Yes; go on. A. Mr. Tobriner then said "What the devil did you tell Mayer Cohen about this thing for?" I told him I had not told Mayer Cohen, that he had learned it before I had from a man named Knight, who had informed the Kanns of it.

Q. Was there anything else occurred between you, to your recollection, on that occasion? A. There may have been something said about a new lease, but I don't recollect exactly what was said.

Q. What happened next? A. That was on the 3rd. The next day I had served a formal notice to quit.

Q. You had served—what do you mean, Mr. Webb? A. Well, I asked a gentleman in my office, Mr. Theall and he left it with one of the Messrs. King.

Q. What was the notice to quit? What premises did it relate to? A. It related to 715 Market space.

Q. On whom was it served? A. It was served, I think, on

474 Mr. Joseph King, who was in charge of the premises there.

Q. What happened next? A. The next day I had a visit from a Mr. Cahill, the 5th day of October. He called to see me to ask me if we would not make a new lease with the Kings. I told him that——

Q. Make a new lease of what? A. A new lease with the Kings of these premises.

Q. Whom did he mean by that? A. He informed me that he was the real estate agent for Mr. Harry King, and he came to see me at his request.

Q. What did you do? A. I told him that I did not care to consider a new lease until the old lease was surrendered. He declined to surrender it until he had some terms from me. I told him I would consider the matter and let him hear from me.

Q. What next? A. The next thing that occurred was that on the 9th day of October Mr. Cohen came into my office with Mr. W. G. Johnson and informed me that the tax certificate was owned by the Kanns and that they would not surrender it.

Q. You speak of the Kanns, Mr. Webb. A. I mean Sigmund and Louis Kann.

Q. Who are also defendants? A. Who are also defendants in this case.

Q. And by Mr. Johnson, you mean their attorney? A. I mean Mr. William G. Johnson, the attorney of record for the Kanns and Mr. Cohen. He said that if I would get rid of the present
475 tenants and lease the property to them they would take a lease of $300 a month and surrender the tax certificate; or if I refused that, they would hold it in hostility to my client and possibly bring ejectment proceedings against her.

Q. Was that the substance of the interview? A. That was the substance of the interview.

Q. What happened next? A. I had a visit from Mr. Tobriner on the 15th day of October, as he has testified.

Q. What occurred in that interview of any importance, as you recollect it? A. Mr. Tobriner called and asked me to let him see some tax receipts which I had paid. I showed them to him and he looked at them and said he would attend to the matter. He then spoke about Mrs. Kennedy writing a letter to Mrs. King waiving the tender of rent, and saying that he would like to have such a letter. We talked the matter over at some length. I told him that it would not be necessary to have such a letter written, that the Kings could send the check as they had before and it would be returned. He said no, he would not do that, that he proposed to make a personal tender of the money; and after some conversation I think I told him I would have the letter written. He then talked about several subjects and finally turned around to me and said "Has Mayer Cohen brought suit in ejectment against you yet?" And as I regarded the question as a foolish one, I answered possibly in the same way. I don't know what exact words I used.
476 Q. Is that all? A. That is all I remember that took place.

Q. Did you have any subsequent interview with Mr. Tobriner with reference to the matter? A. My recollection is that Mr. Tobriner did come to see me at a subsequent time, but I am not certain.

Q. If he did, you are not certain about that? A. If he did, nothing new occurred. My impression is that the substance of this interview took place at two separate interviews, not altogether at one. Then, I will say, several letters passed.

Q. I am coming to that in a moment. I want to know in the first place whether you have now given us the substance of any and all interviews that you recollect that took place between either Mr. Harry King and yourself or Mr. Tobriner and yourself in reference to this subject-matter? A. I think I have.

Q. Have you had any correspondence with either of the Messrs. King in reference to this matter? A. No, sir.

Q. What correspondence have you had with either Mr. Darlington or Mr. Tobriner or both of them with respect to it? A. I have had several letters.

Q. Are those the letters which were given in evidence upon the cross examination of Mr. Leon Tobriner, and which are found in the record beginning at page 262 and running through to page 278? A. Yes. There is one letter written by me, however,
477 which does not appear in the record.

Q. I wish you would go over these carefully and if you find any letter that is not in the record, put it in. A. Yes, I will do that.

Q. Now Mr. Webb, I will ask you what knowledge, if any, you had of the fact that the Kings had failed to pay this tax, in consequence of which failure the sale occurred prior to this date in September, 1901 of which you speak? A. That is the first knowledge I had, on the 25th of September, 1901.

Q. And from whom do you say you derived that knowledge? A. Mr. Knight.

Mr. DARLINGTON: We had expected Mr. Cohen to be examined to-night, and we are not prepared for Mr. Webb's cross examination. We can go on, but it will be rather protracted and not as regular as it might be. If it is agreeable to you, we would like to have that go over until our next session.

Mr. PERRY: Certainly; I am perfectly willing that the cross examination shall go over.

The further taking of these depositions was thereupon adjourned until Tuesday, November 3, 1903, at 8:15 o'clock p. m.

478 WASHINGTON, D. C.,
November 3rd, 1903—8:15 o'clock p. m.

Met pursuant to adjournment, at the office of Wolf & Cohen, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendant-, Messrs. Cohen and Kann, Mr. Johnson.

Present on behalf of the defendant, W. Randall Webb, Mr. Perry.

Present on behalf of the defendant Dewey, Mr. Bradley.

Whereupon the direct examination of the witness HENRY RANDALL WEBB is continued

By Mr. PERRY:

Q. Mr. Webb, I believe you have stated that you want to make some correction in your testimony? A. There are two verbal errors in my testimony. On page 3 in the testimony, in the 7th line from the bottom, where I said "Thursday" it should have been Friday. On the 5th page, about the middle of the page, where I said the "31st of September" it should have been the 30th of September.

It was agreed, by and between counsel, that the above changes might be made in the record.

Mr. PERRY: I find, upon an examination of the testimony
479 taken on behalf of the complainant that there are four letters which are not produced and offered in evidence, which I want to offer now.

The first is a letter dated October 14th, 1901, the original of which I suppose is in the possession of counsel for the complainant. It purports to have been sent by Mrs. Kennedy to Messrs. Darlington and Tobriner.

The next is a letter of October 14th, 1901, purporting to be addressed by Mr. Webb to Messrs. Darlington and Tobriner.

The next is a letter dated October 18th, 1901, purporting to be addressed by Mr. Webb to Mr. Tobriner.

The last is a letter dated October 22nd, 1901, purporting to be addressed by Mrs. Kennedy to Mrs. Caroline King.

I offer in evidence the originals of these letters, if you have them.

Mr. DARLINGTON (after examining copies of the above mentioned letters): I have no doubt that these copies are all right; and we are quite willing that they should go in.

The above mentioned letters are marked, respectively, Exhibit H. R. W. No. 1, Exhibit H. R. W. No. 2, Exhibit H. R. W. No. 3 and Exhibit H. R. W. No. 4.

Said letters are in the words and figures following, to wit:—

480 EXHIBIT H. R. W. No. 1.

WASHINGTON, D. C., *October 14th*, 1901.

Messrs. J. J. Darlington, Leon Tobriner.

DEAR SIRS: I beg to advise you that my counsel, Mr. Henry Randall Webb, is authorized by me to accept service of process and to appear for and represent me in any litigation affecting my interests in the premises No. 715 Market space, this city, which may be instituted, particularly any proceedings relating to the dispos-
481 session of the present tenant, the forfeiture of the lease of said premises and the recent tax-title which the lessee has suffered to arise by failure to pay the taxes as covenanted in the lease.

Yours truly, MARIANNE A. B. KENNEDY.

EXHIBIT H. R. W. No. 2.

Henry Randall Webb, attorney and counselor at law, Columbian building.

WASHINGTON, D. C., *October* 14, 1901.

Messrs. J. J. Darlington, Leon Tobriner.

DEAR SIRS: I have this morning your letter of the 12th instant and I here enclose to you a letter from Mrs. Kennedy which con-

firms my letter of the 10th instant to you as to my authority to represent Mrs. Kennedy and to accept service of process for her.

With reference to the proposition submitted by your letter, I have this to say. That in my opinion Mrs. King, under the covenants in the lease, is already liable in damages to Mrs. Kennedy for all expense she may be put to in the effort to extinguish the tax-title on the premises arising through the breach of that covenant, and in the event of the tax-title being sustained and Mrs. Kennedy ultimately losing the property, the covenantor will be liable for the full fee simple value of the premises. I do not consider therefore
482 that your proposition involves anything on the part of the covenantor to which the covenantor is not already bound.

With the knowledge which I now have of the conduct of the lessee in this matter and the utter disregard shown of the interests of my client when the present situation could have been averted, I think it would be most unwise for my client to abdicate the protection of her own title in favor of a person who has proved so faithless to the important obligations contained in the lease.

My client is, of course, most anxious to defeat if possible the tax title and I will gladly accept aid for that purpose from any source, and if your clients have any information which would aid her I consider they are under moral and legal obligations to impart it to me without delay. I could not, however, in consideration of such aid or under any circumstances consent to any arrangement which would waive the forfeiture of the lease or in any wise affect the right of my client to resume possession of the property.

I think it proper to advise you that the other taxes on parts of this property for the whole of the year ending June 30th, 1898, for one-half of the year ending June 30th, 1900 and for the whole of the year ending June 30th, 1901, which your clients also failed to pay, have been paid by me today.

Yours truly, HENRY RANDALL WEBB.

483 EXHIBIT H. R. W. No. 3.

OCT. 18, 1901.

Leon Tobriner, Esq.

DEAR SIR: I have your letter of Oct. 17th. I did not understand you to suggest in your conversation of Tuesday that you wished Mrs. Kennedy to write to Mrs. King with respect to the tender of the rent for 715 Market space or I should have then told you what I think it proper to say now, that I do not consider that Mrs. Kennedy should write letters to any one in this matter.

I supposed you wished some expression of opinion from me, as her counsel, on the subject and had intended to write you, but in view of the statement of your letter, I assume that it is unnecessary and you will therefore proceed in the matter as you may be advised. I am

Very respectfully yours,

H. RANDALL WEBB.

484 Mr. PERRY: On page 87 of the printed record in the Court of Appeals there is a letter which does not appear to have been offered in evidence during Mr. Tobriner's examination, which I want now to offer in evidence.

The above mentioned letter is marked Exhibit H. R. W. No. 5 and is in the words and figures following, to-wit:

EXHIBIT H. R. W. No. 5.

1630 R. I. AVE., *Oct.* 1*st*, 1901.

To Mrs. H. King, Jr.

I have only learned within the last few days, that you have forfeited your lease of premises 715 Market space by neglecting to pay the taxes, and allowing the property to be *twice* sold, at tax sale.

The lease being thus vitiated, and by advice of my attorney, I must decline receiving any further rental from you.

For further explanation of my action in the matter, I refer you to Mr. H. Randall Webb.

M. A. B. KENNEDY.

485 Mr. PERRY: I also desire to offer in evidence the letters that were introduced upon the cross examination of Mr. Tobriner, from pages 262 to 278 of the complainant's testimony, as part of the testimony on behalf of the defendant.

By Mr. PERRY:

Q. Do you recollect an interview with Mr. Harry King some time in May, 1901? A. Yes, sir.

Q. Can you specify upon what date it occurred? A. It was on the 21st day of May, 1901.

Q. I show you a paper purporting to be a copy of a lease between Mrs. Kennedy and Henry King, Jr., and ask you if you recognize that paper? A. Yes, sir; that paper was handed to me by Mr. Harry King on that day.

Q. On the 21st of May? A. Yes, sir; on the 21st of May.

Q. What occurred between Mr. Harry King and yourself on that day? A. Mr. King came to see me and said that he had been sent by Mrs. Kennedy to see me in regard to making a new lease of the property 715 Market space. He brought this copy in with the original lease, and we went over it and compared it.

Mr. PERRY: I offer this paper in evidence.

Mr. DARLINGTON: What is the object of it?

Mr. PERRY: Mr. Tobriner was asked about it on cross examination, and I think it is competent.

486 Mr. DARLINGTON: We would like to know the object in offering it.

Mr. PERRY: The object of it is to lay a foundation for argument that Mr. King went there on that day and that he then knew the

lease had been forfeited; and that he went there to get a new lease and get rid of trouble about it.

The above mentioned paper is marked Exhibit H. R. W. No. 6 and the same is in the words and figures following, to wit:—

Ex. H. R. W. No. 6.

This indenture made this eighth day of July in the year of our Lord eighteen hundred and ninety between Marianne A. B. Kennedy of the city of Washington in the District of Columbia, of the first part, and Henry King Jr. of the same place, of the second part, witnesseth:

That for and in consideration of the rents and covenants hereinafter reserved and contained, the said party of the first part, *had* let and demised, and by these *premises* does let and demise, unto the said party of the second part, that certain messuage, situate on Market space, that is to say on the north side of Louisiana avenue, between Seventh and Eighth streets, northwest, in the aforesaid city of Washington, and numbered $715, together with all and singular the store fixtures and other fixtures now in and about said messuage and belonging or pertaining thereto, as the property of the said party of the first part, and together, also with the ground on which said messuage stands and all the appurtenances thereto belonging, or in anywise appertaining, for a term of *three years* from and next after the first day of October,
487 eighteen hundred and ninety; upon the following and upon each of the following conditions, that is to say, upon condition;

First, that the rent hereinafter reserved and every installment thereof shall be punctually and promptly paid to the said party of the first part and her assigns in the manner and at the time or times hereinafter mentioned for the payment thereof.

Secondly, upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will use and occupy the store part or portion of said messuage as, and only as, a fancy or dry-goods store, and the remaining part or portion of said messuage either as and for a dwelling house or as and for offices:

Thirdly, upon condition that the said party of the second part, his executors, administrators or assigns, shall not, during the continuance of the aforesaid term, either assign or sublet the said demised premises, or any part thereof, without first obtaining the consent, in writing, of the said party of the first part to such assignment or sublease.

Fourthly: upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will, at his or their cost and expense, keep the said demised premises and every part thereof, in

good repair and condition, excepting only such repairs as may be rendered necessary by accidental fire;

Fifthly, upon condition that the said party of the second part, his executors, administrators or assigns, will, during the continuation and until the end and determination of the said term, for
488 which the said premises are demised, pay or cause to be paid in each and every year thereof the taxes, general and special of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government.

Sixthly, upon condition that, at the expiration or other sooner determination of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will peaceably and quietly yield up and surrender to the said party of the first part, her heirs or assigns, the said demised premises and every part thereof, in good condition and repair excepting only reasonable wear and tear and such repairs as may be rendered necessary by accidental fire as aforesaid, and;

Seventhly, upon condition that during the continuance of the aforesaid term, the said party of the second part, his executors, or assigns, shall and will pay to the said party of the first part an annual rent of twenty four hundred dollars ($2400.) for the aforesaid demised premises, in and by equal monthly instalments of two hundred ($200.) each, on the last day of each and every month during the continuance of the aforesaid term; and subject to the aforegoing conditions, and each of them.

To have and to hold the said demised premises unto the said party of the second part for the term of three years from and next after the first day of October 1890 as aforesaid.

And the said party of the second part, having accepted and now again accepting the said demised premises for the term aforesaid, upon the conditions and every of them hereinbefore mentioned and set forth doth, by these presents, for himself, his executors, administrators and assigns, covenant, promise and agree to and with
489 the said party of the first part that he, the said party of the second part shall and will well and truly observe, keep, obey and perform the aforesaid conditions and every of them, according to their and its true intent and meaning; and further:

That if he, the said party of the second part, his executors, administrators or assigns, shall at any time or times refuse, neglect or fail well and truly to observe, keep and obey and perform the aforesaid conditions and every of them, according to their or its true intent and meaning, then, at the option or election of the said party of the first part, the aforesaid term and every unexpired part thereof, shall instantly cease and determine (anything herein contained to the contrary notwithstanding) and be thereafter utterly null and of no effect; and it shall thereupon, at *the* option and election, be lawful for the said party of the first part into and upon the said demised premises, and into and upon any and every part

thereof, wholly to re-enter and the same to have again, repossess and enjoy as in her first and former estate, as fully as though said demise had never been made.

In testimony whereof the said parties hereto have respectively hereunto set their hands and seals on the day and year first hereinbefore written.

(Signed) MARIANNE A. B. KENNEDY. [SEAL.]
H. KING, JR. [SEAL.]

Witness:
MYER COHEN.

DISTRICT OF COLUMBIA, *ss:*

I, Myer Cohen a notary public in and for the District aforesaid do hereby certify that Marianne A. B. Kennedy and H. King, Jr. parties to a certain lease, bearing date on the eighth day of July A. D. 1890, and hereunto annexed, personally appeared before me in the District aforesaid, the said Marianne A. B. Kennedy
490 and H. King, Jr. being personally well known to me to be the persons who executed the said lease, and acknowledged the same to be their act and deed.

Given under my hand and notarial seal this eighth day of July A. D. 1890.

MYER COHEN,
Notary Public.

By mutual consent this lease is herewith extended from the date of its expiration for a further term of five years, subject to all the conditions herein mentioned and that Mr. King is to pay the taxes on said leased property during the term.

MARIANNE A. B. KENNEDY. [SEAL.]
H. KING, JR. [SEAL.]

Dec. 27/92

Witness:
S. WOLF.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me the said Marianne A. B. Kennedy and H. King, Jr. and acknowledged the foregoing renewal to be their act and deed.

Given under my hand and notarial seal this twenty-ninth day of December, A. D. 1892.

ADOLPH G. WOLF,
Notary Public.

By mutual consent the term of the foregoing and annexed lease is herewith extended from the date of the expiration of the fore-

going extension of the said lease for a further term of five years subject to the other conditions before mentioned and the further condition that the lessee H. King, Jr. shall pay the taxes on the said leased property during the term hereby created, and it is fur-
491 ther agreed that the said lessee at the expiration of the term hereby created, shall have the privilege of extending the within lease for an additional term of five years.

In witness whereof we have hereunto set our hands and affixed our seals this eighth day of October 1896.

MARIANNE A. B. KENNEDY. [SEAL.]
HENRY KING, JR. [SEAL.]

Witness:
ADOLPH G. WOLF.

DISTRICT OF COLUMBIA, *ss:*

I, Adolph G. Wolf, a notary public in and for District aforesaid do hereby certify that Marianne A. B. Kennedy and H. King, Jr., parties to a certain extension of lease bearing date on the eighth day of October, 1896, and hereunto annexed, personally appeared before me in the District aforesaid, the said Marianne A. B. Kennedy and H. King, Jr., being personally well known to me to be the persons who executed the said extension of lease and acknowledged the same to be their act and deed.

Given under my hand and notarial seal this eighth day of October 1896.

ADOLPH G. WOLF,
Notary Public.

AUGUST 26, 1897.

In consideration of the sum of one dollar and the assumption of the covenants of this lease, and for other valuable considerations, I Harry King, administrator of Henry King, Jr., deceased, do hereby sell, assign and transfer to Caroline King all my *my* and all the right, title and interest of said Henry King, Jr. in, to and under the foregoing lease from M. A. B. Kennedy.

492 Witness my hand and seal at Washington, D. C.

HARRY KING. [SEAL.]
Administrator c. t. a. Est. of Henry King, Jr.

I hereby consent to the foregoing transfer and assignment.
MARIANNE A. B. KENNEDY.

(Endorsed:) Lease, assignment of lease, M. A. Kennedy & Henry King, Jr.

9.29 a. m. received for record. October 17, 1896, and recorded in Liber 2146 folio 287 *et seq.*, of the land records of the District of Columbia.

C. H. TAYLOR, *Recorder.*

(Office of the Recorder of Deeds, Washington, D. C.)

493 By Mr. PERRY:

Q. What occurred between you and Mr. King? A. Mr. King told me that this lease had been made for me by Mr. Tobriner. He said he wanted the new lease made with his firm under the name of Caroline King and Sons, composed of Caroline King, Harry King and Joseph King; that he would like a lease of five years from the 1st day of October, 1901, with a privilege of four years' renewal; but that if he could not get that he would be satisfied with two years. There was something said at the time about the right or the privilege of purchasing the property after Mrs. Kennedy's death. After Mr. King left I saw Mrs. Kennedy and submitted the proposition to her, or rather she had spoken to Mr. King before he came to see me, as both she and Mr. King said. She said she was not willing to make any longer lease than the one already existing, but she was willing to make a lease for the same length of time under the same terms, with the firm of Caroline King and Sons.

494 Q. Did you communicate this to Mr. King? A. I wrote him a letter the next day.

Mr. PERRY: Gentlemen, have you that letter?

Mr. DARLINGTON: Yes, we have it.

(Counsel for the complainant produces the letter.)

The WITNESS: This is a copy of the letter I wrote him the next day.

By Mr. PERRY:

Q. Is this the original letter? A. This is the letter.

Mr. PERRY: I offer this letter in evidence.

The above mentioned letter is offered in evidence, marked Exhibit H. R. W. No. 7 and the same is in the words and figures following, to wit:—

EXHIBIT H. R. W. No. 7.

Henry Randall Webb, attorney and counselor at law, Columbian building.

WASHINGTON, D. C., *May* 22, 1901.

Henry King, Esq.

DEAR SIR: I saw Mrs. Kennedy yesterday and went over the question of your lease with her. She is perfectly willing to make a new lease upon the same terms as the present one, as you want, with your firm. That is to say two years from the 1st day of October, 1901, with the privilege of a renewal of five years after its expiration. I will give you Mrs. Kennedy's reasons for this, if you call at my office. We discussed the question of an option of purchase, but

she did not seem willing to agree upon any sum; and I ad-
495 vised her that the mere allowing you to have the first chance to purchase the property would not amount to anything or give you any greater privilege than you have now.

Very respectfully yours, H. RANDALL WEBB.

(*Envelope.*)

Henry Randall Webb,
Attorney at law,
Columbian building,
Washington, D. C.

(Stamp.)

HARRY KING, Esq.,

810–814 *7th Street N. W.*,
City.

496 By Mr. PERRY:

Q. Did anything further result from that interview? A. Mr. King called to see me the next day with regard to it and I stated more particularly Mrs. Kennedy's ideas and wishes on the subject, and that was the end of it.

Q. When and from whom did you first learn that any correspondence or negotiations between Mrs. King or anybody representing her, and Mr. Wiltsie, was in progress for the purchase of the tax certificate in question? A. I first learned from Myer Cohen on or about the 8th day of October, 1901.

Q. It has been charged in this case that the purchase of this tax certificate by Mr. Myer Cohen was made either at your instance or with your acquiescence. Is that correct? A. No; on the contrary it was made against my wishes and against my protest.

Q. It has been charged in this case that this proceeding to enforce the forfeiture of the lease, on account of the breach of the covenant to pay taxes, was forced upon the late Mrs. Kennedy and was not voluntary upon her part. So far as you know is or is not that correct? A. It is not correct.

Mr. PERRY: Mr. Webb wants to make a statement, somewhat in the nature of personal explanation.

You may go on, if there is no objection to it, and make the statement.

The WITNESS: The statement made by me in my answer, alleging the non-payment of taxes by Henry King, Jr., prior to his death, was made on information and belief, and I now find it to be erroneous.

497 Cross examination.

By Mr. DARLINGTON:

Q. I want to call your attention to the affidavit filed by you in this case on the 18th day of April, 1902, and I quote from that affi-

davit as follows:—"Affiant further states that since the institution of proceedings for the possession of said premises for his client, he has examined into the facts and has ascertained that said Harry King, Jr. never paid any of the taxes on said property during his lease, but that, on the contrary, the said taxes were all paid by his client, Mrs. Kennedy." What was the examination which you there state you made, and what was your method of ascertaining the facts which you say you ascertained? A. Mrs. Kennedy produced most of the tax bills and said that she had paid them, during the time of the pendency of this lease.

Q. Your examination then consisted simply in hearing the statement of Mrs. Kennedy, and accepting it as true?

Mr. PERRY: I object to the question on the ground that it is not in accordance with what the witness has stated.

Mr. DARLINGTON: If it is not the record will show.

A. That, together with the production of the various receipts.

By Mr. DARLINGTON:

Q. Do those tax receipts show who paid the bills? A. No. I will also say that I took the trouble to go to the tax office and I was informed that these tax bills had all been paid by Swormstedt & Bradley.

Q. Did you take the trouble to inquire of Swormstedt &
498 Bradley who furnished the money? A. I did. I would like to add, also, that there was some statement made by one of the clerks of Mr. Bradley——

Mr. DARLINGTON: I object to any statement made by a clerk.

Mr. PERRY: You are asking about the trouble he took to ascertain these facts.

Mr. DARLINGTON: I did not ask him for any hearsay statement.

Mr. PERRY: I think it is proper for him, in answering the question, to state what information he had.

Mr. DARLINGTON: We differ about that.

Mr. PERRY: I think Mr. Webb is entitled to testify about that.

Mr. DARLINGTON: I move to strike out the answer.

The WITNESS: The statement made by the clerk was to the effect that Mr. King had paid these taxes to Mrs. Kennedy and she had sent the money to them. I inquired very particularly about this fact of Mrs. Kennedy and she assured me positively that Mr. King never had paid the taxes.

By Mr. DARLINGTON:

Q. Since we have been taking testimony in this case you have identified Mrs. Kennedy's letters to Mr. King with reference to the payment of these taxes, and the checks to her order and her endorsement upon them? A. Yes.

Mr. PERRY: You refer to the letters from Mrs. Kennedy?

Mr. DARLINGTON: Yes; to those that are in evidence.

499 Q. You stated in this affidavit to your answer that your client had no copy of the lease, and that her forgetfulness of the fact that the tenant was obliged to pay the taxes was due in part to that circumstance and in part to the extreme age of your client. How do you reconsile that statement with these papers that have been produced? A. To what papers do you refer?

Q. To Mrs. Kennedy's letters, receipts and checks. A. Those papers, which you have produced, are entirely and absolutely at variance with what Mrs. Kennedy told me.

Q. Then the part that the forgetfulness of Mrs. Kennedy plays in this case is quite different from what you assumed it was when you made this affidavit; is it?

Mr. PERRY: I object to the question as argumentative.

A. That is a very hard question to answer.

Q. I will repeat the question. Then the part that the forgetfulness of Mrs. Kennedy plays in this case is quite different from what you assumed it was when you made this affidavit; is it? A. Mrs. Kennedy very evidently forgot that Mr. King had furnished her with the money to pay the taxes.

Q. When was it that Mrs. Kennedy informed you that she had no copy of this lease? A. On several occasions.

Q. And at that very time you had the copy, which you have produced in evidence here to-night? A. Yes; but she had no copy herself.

Q. Do you say she had this copy? A. No; that copy was given to me by Mr. King.

500 Q. Referring to Exhibit H. R. W. No. 6 you stated that you offered to give a new lease of the property not to Mrs. King but to herself and her sons, in May, 1901? A. Yes, according to that letter of mine. That was under the instructions of Mrs. Kennedy.

Q. They could have had that new lease if they had wanted it, could they not? A. Yes.

Q. And in fact you wrote a letter which you have produced in evidence, under date of May 22nd, offering, in terms, this new lease to the firm instead of to Mrs. King individually? A. I did; yes, sir.

Q. So that if Mr. Harry King or his mother had wanted a new lease at that time they could have gotten it? A. Yes, sir.

Q. But they wanted a new lease with an option to purchase; did they not? A. No; the option to purchase was left out.

Q. By whom? A. By Mr. King. That question was discussed very thoroughly and I found out that he had a very different idea from what I had, and that we did not agree.

Q. What negotiations, if any, followed this letter of May 22nd?

A. A conversation between Mr. King and myself, which took place either on the 23rd or on the 24th of May.

Q. What was that conversation? A. I do not remember the details of the conversation, but it was in regard to the lease.

501 I had understood Mr. King to say that he wanted to purchase the property at so much money, at the end of the lease; but he said that he wanted an option to purchase. As soon as I found out that his object was to bind Mrs. Kennedy and not himself I declined to consider it.

Q. And that was the end of the negotiations? A. That was the end of the negotiations.

Q. He did not want the lease without he had some option privilege? A. No, he did not say that. He just left and I expected him to return, but he never did.

Q. How long have you known the defendants Kann? A. I have known them for about two and a half years, I suppose.

Q. Your acquaintance began with them when? A. I had met them prior to that, but my acquaintance began in May or June of 1901. My acquaintance with them is very slight.

Q. Did you have any business with them in May or June 1901? A. I had some business in regard to changing the store down there in 1901.

Q. Which of them was it that proposed that he would give more for this property than the Kings would, and would like to get a lease over their heads? A. That was not in the nature of a proposition. It was simply a casual remark made.

Mr. DARLINGTON: I object to any description of the remark, and call for the facts.

502 The WITNESS: It was not a proposition to lease. It was simply a statement that they were willing to do it.

Mr. DARLINGTON: The objection is renewed and the question repeated, and the attention of the witness is invited to the question:

Q. Which of them was it that proposed that he would give more for this property than the Kings would, and would like to have a lease over their heads? A. Mr. Louis Kann made what you call a proposition; but there was nothing said about a lease over the heads of the Kings.

Q. Tell us what he said? A. He simply said that he would be willing if they could get the property, to pay $300 a month for it and pay all expenses.

Q. What reply did you make? A. I do not think I made any reply.

Q. I wish you would think and see if you did not. A. Not that I remember. There was an existing lease, and I never considered the matter the second time.

Q. Did you not tell him there was an existing lease? A. It was a well understood thing by all of us. They all knew it.

Q. Have you any means of letting us know how things are well

understood, except by what was said? A. Well, then I supposed they knew all about the lease.

Q. Once more, what, if anything, did you say to them about a lease? A. I never said anything to them about a lease.

503 Q. You made no answer to them at all? A. No.

Q. What was your reason for saying that you supposed they knew about the lease? A. I had had a conversation with their attorney, Mr. Cohen, who gave me to understand that he was perfectly well acquainted with the terms of this lease.

Q. Please tell us what he said? A. I do not remember what he said.

Q. What were your conversations with Mr. Cohen about? A. Mr. Cohen was representing the Kanns and he came to see me in regard to these improvements and as to whether Mrs. Kennedy would give her consent to some changes they wanted to make in their building.

Q. In what connection did the terms of the King lease come up for discussion? A. It did not come up for discussion. I cannot say what Mr. Cohen said to me about that; but he informed me that he knew all about the lease, and I think he said to me, on one occasion, that he had endeavored to buy this lease from Mr. King.

Q. On what occasion was that? A. That was when we were talking about these improvements and changes. I do not remember the date and I do not remember who was present.

Q. Who was present when Mr. Louis Kann said to you that he would give $300 a month for the property and pay all ex-

504 penses, if that was what he did say? A. I do not know whether anybody was present at that moment or not.

Q. Can you not turn your mind back and endeavor to refresh your recollection about that? A. No, because it was on an occasion when we were down there discussing what could be done so as to allow these improvements to be made in such a way as not to injure, in any way, the store occupied by Mr. King. There were three or four people present at different times. We were moving around there and whether anybody else was immediately present at that time I do not remember; but I think not.

Q. Who were the three or four persons who were moving around? A. Mr. Cohen, Mr. Sigmund Kann, Mr. Louis Kann, and later on Mr. Poindexter joined the party.

Q. He was the architect, was he? A. Yes, sir.

Q. Let me read you from your affidavit which I have before referred to: "Subsequently this affiant was advised that the defendants Kann were desirous of leasing said premises and were willing to pay a rental of $1200 per year more for the property than complainant was paying, but no negotiations for a lease to the defendants Kann took place between this affiant or his client, said Marianne A. B. Kennedy and the said defendants Kann, as the lease of the complainant precluded any such negotiations." Is that a fair statement of what actually occurred? A. That is the same conversation I just spoke about.

505 Q. Is that a fair statement of what occurred? A. Yes.

Q. At page 4, of your testimony in this case you stated that Mrs. Kennedy wrote you a note on the 27th of September. Have you that note. A. The original?

Q. Yes. A. Yes, sir; I have it.

Q. Will you produce it? A. Yes, sir. (The witness produced the note.)

Q. At the top of page 3 of the record you referred to a note written by you to Mrs. Kennedy on the 27th. Have you that letter or a copy of it? A. No, I have not.

Q. Why is it you have not a copy of that letter? A. That was a very short letter that I wrote to her as I was hurrying to catch a train to go to New York. I just wrote her a few lines, because I had neglected to say anything about the non-acceptance of the rent, if she should decide to forfeit the lease, and I wrote her to that effect.

Q. Was that written from your office? A. It was written from my office. It was a hurried note, written just as I was leaving for the train.

Q. Do you keep a letter press book in your office? A. Yes; but I did not make a copy of this letter.

Q. So that you can neither produce the copy nor, although you are her executor, can you produce the original? A. No, I could not find it among her papers. I looked very carefully for it.

506 Q. It was a letter from you to her dated the 27th? A. Yes, sir.

Q. The letter which you produce is dated "Sunday evening." Do you know what day of the month that was? A. The 29th of September.

Q. You had written her a letter advising her not to accept the rent if it should come in? A. No, not advising her, but telling her that if she decided to forfeit the lease she was not to accept the rent.

Q. Let me read you what she says: "You say I must not receive the rent—which he will probably send me by mail on Tuesday morning—but I don't see how I can refuse it, unless I know when I am to get another tenant." Do you think she was in error about that? A. Yes; she was in error, taking it in that way, as meaning that I told her she must not accept the rent. I told her, conditionally, that she must not accept the rent.

Q. She states: "I do not see how I can refuse it unless I know when I am to get another tenant." A. I think that "when" is meant for "where" although it looks like when.

Mr. DARLINGTON: I object to the witness stating what he thinks it is meant for, when it is perfectly plain.

Q. When did you receive that letter? A. I received that letter on Monday morning, September 30th.

Q. So that on Monday morning September 30th, you had notice from Mrs. Kennedy that she did not see how she could follow your

advice in refusing to accept this rent, unless she knew when
507 or where she was to get another tenant? A. Yes, sir.

Q. And upon the strength of that letter you proceeded to find another tenant for her? A. To see if I could get one.

Mr. DARLINGTON: I offer this letter in evidence.

The above-mentioned letter is marked H. R. W. Cross-ex. No. 1, and is in the words and figures following, to-wit:—

EXHIBIT H. R. W., CROSS EX. No. 1.

SUNDAY EVENING.

DEAR MR. WEBB: I had just written you a note Saturday morning to send by my messenger when yours—announcing your contemplated absence was handed me.

I had seen my friend and physician Dr. Fry the evening before, and tried to explain my new experience with Mr. King, and he asked me if I could communicate with you early in the morning of Saturday & request you to telephone him at his office 1909 Q street at what time between the hours of 10 and 1 o'clock you could give him an interview at your office. His views in the matter seem to accord with yours & I should be glad to have you two talk it over together, and then see me & give me further advice.

You say I must not receive the rent, which he will probably send me by mail on Tuesday morning—but I don't see how I can refuse it, unless I know when I am to get another tenant.

Very truly yours, M. A. B. KENNEDY.

508 By Mr. DARLINGTON:

Q. Why did you wish to do that? A. Why did I wish to do what?

Q. To get another tenant? A. I wanted to see if I could get her another tenant.

Q. Why? A. So that I could lay the whole situation before her, and have her decide what she wanted to do.

Q. You found no request in this letter that you should seek another tenant? A. No; but I understood that to mean a request to find out if anybody would be willing to take the premises.

Q. Please take this letter and read the part which you understood to mean that she wished you to see if you could find another tenant. A. This is the part: "I do not see how I can refuse it unless I know where I am to get another tenant."

Q. You would construe that to be a commission to you to go out and hunt a tenant? A. I understood that to be a request to me to find out if anybody was willing to take the premises, if it was vacated.

Q. And you really construed that to be a request to do that? A. That was my understanding of it; yes, sir.

Q. Why were you seeking another tenant for her? A. I was not seeking another tenant.

Q. You have just said that you went out to see if you could get another one for her? A. No, I did not. I was finding out if
509 I could find anybody who would be willing to take the property.

Q. At more rent? A. Yes, at more rent.

Q. Why do you not answer that question straight out? A. I am trying to answer the question straight.

Q. Why were you trying to find another tenant at a higher rent? A. Because it is a natural thing that a person would like to get a better tenant if he can.

Q. You had no other motive?

Mr. PERRY: Do you mean personal motive?

Mr. DARLINGTON: Any kind of a motive.

By Mr. DARLINGTON:

Q. I mean any kind of a motive, personal or otherwise. A. My motive was to do the best I could for my client.

Q. By that you mean to get a higher rent, if you could? A. Yes.

Q. You had no other motive? A. No; I had no other motive.

Q. Why then did you not give the Kings, who had been there so long and had their business established there, a chance? A. I did not give anybody a chance. I went up to lay the facts before Mrs. Kennedy.

Q. Did you not say in this letter that you went right to Mr. Cohen and asked him if his clients would take the property? A. Yes.

510 Q. Why did you not give the Kings a chance, when they had been there so many years and had their business established? A. I could not give them a chance until Mrs. Kennedy said whether the present lease was to be forfeited or not.

Q. If Mrs. Kennedy had the right to forfeit the lease and make a new lease with the Kanns, she had an equal right to forfeit it and make a new lease with the Kings; you knew that, did you not? A. The question of forfeiting the lease was under consideration then, and not so much the question of a new tenant.

Q. You have just told us that your only motive was to get a higher rent. A. Yes, sir; that was my motive; to find out whether that could be done.

Q. What did you mean then by the statement you have just made that your motive was not so much to get a new tenant as to decide upon the forfeiture. A. I mean that the question of forfeiting the old lease should come up before the question of getting a new tenant.

Q. Did you go to see Mr. Cohen about the question of forfeiting the lease or about a new tenant? A. I simply went to inquire

whether the Kanns still stood ready, under that offer or proposition, to take the property.

Q. Will you not please give me a specific answer? Did you go to Mr. Cohen with a view of the forfeiture of the lease or with the
511 view of getting a new tenant? A. I went with a view of finding out if they were still willing to take the premises at $300 a month.

Q. You went to him with a view of learning whether a new tenant could be gotten? A. Yes.

Q. Now my question is why you did not give the Kings a chance? A. You mean at that time?

Q. Yes. A. I went up at that time, as I told you, to lay the facts before Mrs. Kennedy so that she could decide whether she would forfeit the lease or not.

Q. I am asking you about the time you went to Mr. Cohen and why, instead of going to him and endeavoring to give these rival merchants an opportunity to displace the Kings and drive them out of their place of business, you did not give them a chance to become new tenants at an increase of rent if that is what you wanted? A. I did, after that.

Q. Before you had made an agreement with Mr. Cohen? A. I made no agreement with Mr. Cohen.

Q. Let me read you from Mr. Cohen's answer, at page 41, speaking of the occurrences on the 30th of September: "When this defendant informed the said Webb that his clients would take a lease of said premises on the terms stated as hereinbefore set forth, the said Webb agreed to said proposal, and on behalf of his client accepted the same, and this affiant supposed there was no doubt, and still believes that there is no doubt whatever of the legal and
512 moral right of the lessor to terminate the lease and evict the tenant for the default in the payment of taxes, and that as the said Webb informed this defendant that his client had so decided, and would refuse the rent the next day when it was tendered and proceed to evict the tenant, this affiant regarded the matter of the lease to his client as settled, so far as an unwritten agreement could settle it." Is that true or untrue? A. That is a mistake on the part of Mr. Cohen. I made no agreement with him at all.

Q. So that you had your client return this rent and declare the lease forfeited, when you had no agreement at all with a new tenant? A. No agreement.

Q. What was the object in going to Mr. Cohen to find out if he was willing to pay this higher rent, if you were going to forfeit the lease without any agreement for a higher rent? A. I simply had a renewal of the offer.

Q. But you knew the renewal was not binding unless it was accepted? A. No; it was not binding.

Q. When, prior to the 30th of September, 1901, did you last see Mrs. Kennedy? A. I saw her on the 26th day of September, in the afternoon.

Q. At what time on September 30th did you see her? A. I should judge about half past 4 o'clock.

Q. Was that before or after you had gone to Mr. Cohen and
513 asked him whether his clients would lease at $300 a month?
A. After I had seen Mr. Cohen.

Q. Let me read you from page 71 of your answer: "This defendant admits that it is true that on the 30th day of September he called upon the defendant, Cohen, attorney of the defendants Kann, and inquired whether their said clients were still willing to lease said property at a rental of $300 per month and the payment of all taxes, as they had some months previously indicated their willingness to do, but this defendant says that such action on his part was not based on 'what he understood to be the wish and instruction of said client' as in said paragraph alleged, but upon what he knew and still knows to be the specific authority, direction and desire of his client." How was that specific authority, direction and desire indicated? A. It was indicated by that letter.

Q. Please read the part of that letter which is a specific direction to you to hunt another tenant? A. I have read that to you. It is the latter part of the letter, which I understood to mean that: "I do not see how I can refuse it unless I know where I am to get another tenant."

Q. You say in your answer that you were not acting upon what you understood to be the wish of your client but upon what you knew and still know to be the specific authority, direction and desire of your client? A. That letter is the only thing I had.
514 Q. Are you able to find any specific authority or direction there?

Mr. PERRY: I object to this method of examination. The witness has specifically pointed out twice the language in that letter to which he referred.

By Mr. DARLINGTON:

Q. Will you please point out in that letter the specific authority direction or desire of your client, to which you refer in your answer. A. I have pointed out the latter part of the letter, which I have already read.

Q. You mean the statement that she does not see how she can refuse the rent, unless she knows when she will get an other tenant? A. Yes.

Q. When you called upon Mr. Cohen, on the morning of September 30th, what did you tell him about this tax sale certificate? A. I asked him first if his clients were willing——

Q. My question is what did you tell him about the tax sale certificate? A. I told him the property had been sold for taxes and the lease had been forfeited, in my judgment, and asked him whether, if it was forfeited, his client, the Kanns, were still willing to take the property at $300 a month.

Q. What reply did he make to you when you told him of the tax sale and certificate? A. I do not think he made any reply. He said he would go and see his client and let me know.

515 Q. When did you next see Mr. Cohen on that day? A. I think about an hour after that.

Q. Then what took place? A. He came and said he would take it at that price, provided they could get possession, and it was not used as a club on the Kings, or words to that effect.

Q. Then what followed? A. Then I think——

Q. Not what you think; but what did you say to him? A. I told him I would submit the whole proposition to Mrs. Kennedy. Of course I do not say those are the exact words; but that is the substance of the interview.

Q. When did you next see him? A. I saw him that evening about 6 or half past 6 o'clock on my front door step, when I got home.

By Mr. PERRY:

Q. Was this on the same day? A. Yes, sir.

By Mr. DARLINGTON:

Q. When you told him about the tax sale, did you tell him who had purchased at the tax sale? A. I think I did.

Q. Who was it? A. C. H. Wiltsie, of Rochester.

Q. You knew that C. H. Wiltsie was the purchaser, and that he lived in Rochester? A. I did. I had learned those facts from Mr. Knight, and also from the tax collector.

Q. And it was you that gave Mr. Cohen that information;

516 was it? A. No, I found out subsequently that Mr. Cohen——

Q. One moment; please answer the question. A. Yes, I gave him that information.

Q. When you saw him that evening he told you he was going to Rochester to do what? A. To buy the tax certificate.

Q. And you told him you knew of no way to prevent it. A. I may have used that expression; but I did not want him to go.

Q. Is that the expression you did use? A. I am not certain of that.

Q Let me read you from page 6 of your testimony:

Mr. JOHNSON: I want to enter an objection to this form of question as to the interview between Mr. Webb and Mr. Cohen as not calling on Mr. Webb to state what he said to Mr. Cohen and what Mr. Cohen said in reply, but as interrogating him about fragments of the conversation.

By Mr. DARLINGTON:

Q. I read from page 6 of your testimony: "I asked him not to do that, and he insisted upon going and I said: 'I see no way to prevent it.'" A. That is, to the best of my recollection, what occurred.

Q. I now read you from page 86 of your affidavit: "To this declaration of said Cohen of his purpose to purchase the tax sale certificate affiant replied, 'I don't know about that' indicating his dissent from said Cohen's proposition, to which said Cohen replied,
'Well, I do.' To which affiant replied 'I am sorry to hear
517 it, but I see no way of preventing you.'" What was your object in telling Mr. Cohen that you saw no way of preventing him from going? A. Just what I stated.

Q. Had you any object in assuring him that you saw no way of preventing him from doing that? A. No; I had no object in it at all.

Q. You then had notice, about 6 o'clock on September 30th, that this gentleman, to whom you had brought the notice of this tax sale of your client's property, the name of the purchaser and his residence, was going to use that information for the purpose of buying up an adverse title to your client's property. A. The title was already adverse to my client.

Q. You then had notice, about 6 o'clock on September 30th, that this gentleman to whom you had brought the notice of this tax sale of your client's property, the name of the purchaser and his residence, was going to use that information for the purpose of buying up an adverse title to your client's property? A. I did; yes.

Q. What steps did you take for the protection of your client?

Mr. PERRY: I object to the question as being hardly a proper one. There is no objection to Mr. Webb being asked what he did. Possibly Mr. Webb's idea as to what was necessary to protect his client might have been different from those of myself or anybody else.

Mr. DARLINGTON: These questions would not have been asked except for the character of the direct examination to-night.

518 Mr. PERRY: I hardly understand that.

By Mr. DARLINGTON:

Q. What steps did you take for the protection of your client? A I cannot understand that question. As an adverse title had already been acquired by one party I cannot see any reason why that title was more adverse or inimical to my client's property in the hands of one than in the other.

Q. You have said in your affidavit and answer both, that you remonstrated with Mr. Cohen on the ground that you had given him this notice? A. I did; but when Mr. Cohen informed me that he had known about it before I told him I ceased to remonstrate with him.

Q. If your opinion was that the tax title was no better in the hands of one than in the other, why did you remonstrate with Mr. Cohen about using the information you had given him to buy this title? A. Simply because I did not like it. I gave Mr. Cohen no information that was not on the public records of the District of Columbia.

Q. What, if anything, did you know of Mr. Wiltsie? A. Nothing at all.

Q. You had never heard of him before? A. I never heard of him until Mr. Knight mentioned his name to me.

Q. Were you not aware that he had been engaged in the business of buying tax titles? A. I was not.

Q. You said when you went to the tax office you found not
518a only that a tax sale had been made and a certificate issued; but that it had become irredeemable? A. Yes, sir; I did.

Q. Why then were you seeking to obtain a new tenant for the property, if you had lost your title?

Mr. PERRY: That is a question of law. I object to it as being a particularly objectionable course of cross-examination, in my opinion.

Mr. JOHNSON: I object to it on the ground that the question assumes a fact which has not been admitted, the witness not having said that he had lost his title.

A. I will say that I am very much at a loss how to answer that question. From the beginning I have always regarded the question of the forfeiture of the lease and the validity or invalidity of the tax title as two separate and distinct things.

Q. That does not help me any. What I want to know is why, if you learned on the 26th of September that the property had been sold and the tax title had become irredeemable, you considered the subject of leasing a property which your client had lost? A. I did not regard the property as lost to my client.

Q. Why not? A. Because I thought that something might be done with the tax title; that it might be fixed with Wiltsie or it might be fixed with whoever purchased it. The fact is I did not think of the matter at all.

Q. Which is correct; that you thought the matter might be fixed with Wiltsie or that you did not think about it at all?
519 A. I think I did not think about it at all.

Q. Then why did you tell us that the matter could be fixed with Wiltsie, if you did not so think? A. I do not know why. I cannot answer that question as to the whys and wherefores.

Q. Is it not a fact that you assumed that the tax title could be purchased from Wiltsie? A. If I did I assumed it without any reason for it.

Q. Did you not know that if Mr. Cohen bought that title from Wiltsie, you would find it more difficult to get it from him than you would from Wiltsie? A. What is that?

Q. Did you not know that if Mr. Cohen was going to buy this title from Wiltsie, and deal at arms' length with you, as you have stated, it was going to be more difficult for you to deal with him than it would be with Wiltsie? A. I cannot say that I did. As I say, that matter did not present itself to my mind.

Q. Can you explain how it is that, as Mrs. Kennedy's attorney

and business agent, you heard this gentleman say that he was going to buy this title and deal with you at arms' length; and yet it never occurred to you that it would be any worse in his hands than in the hands of the person he was buying it from? A. I did not regard the tax title in the hands of Mr. Cohen as any more inimical or dangerous to the interests of my client than it was in the hands of Wiltsie; and I believed that if it became necessary I could defend the tax title in Mr. Cohen's hands as well as I could in Mr. Wiltsie's hands.

520 Q. How do you reconcile that view with the fact that he was going to Rochester and be put to expense and trouble, for the purpose of buying this tax title and holding it adversely to you, with your statement that you thought the title in his hands would be no more inimical to you than it would in the hands of Wiltsie? A. I regarded the buying of the tax title by Mr. Cohen as his affair. It did not interest me and I did not care what he did with it.

Q. You did not care what he did with it? A. I mean to say it did not interest me. I did not regard the tax title in his hands as any more of a cloud upon the title of my client's property than it was in the hands of Wiltsie.

Q. It did not occur to you that, as he was going to Wiltsie to buy it from him, you would find it more difficult to settle with him than it would be with Wiltsie? A. No.

Q. You thought he would be at the trouble and expense of going to Rochester and buying that tax title from Wiltsie and would then settle with you as easily as Wiltsie would have done, in the face of the fact that he had told you he would buy it from Wiltsie and deal with you at arms' length and in the face of your remonstrance against his buying? A. As I say, I knew nothing about Mr. Wiltsie and I did not know on what terms he would settle.

Q. You were aware that there is a telegraph line between here and Rochester? A. Yes, sir.

Q. And also that there is a long distance telephone line?

521 A. I suppose so.

Q. Why then, in the protection of your client's interests, was it that you did not, in some way, communicate with Rochester and prevent this title being bought up by one who would deal with you at arms' length, as Mr. Cohen gave you notice he was going to do? A. I have already explained that and I would like to explain it again. I considered the question of this tax title against my client's property as an affair between my client and myself and whoever held the tax title. Why I did not buy it up and why I did not stop Mr. Cohen from going to Rochester was an affair between my client and myself and between Mr. Cohen and myself.

Mr. PERRY: I insist that this witness has answered this question repeatedly. I have, heretofore, interposed no objection but there should be an end to it now.

Mr. DARLINGTON: I think I will have to be satisfied with that answer, if the witness and his counsel are satisfied.

By Mr. DARLINGTON:

Q. I understand you to say that you decline to answer further because your action was a matter between your client and yourself and Mr. Cohen and yourself? A. I do not decline to answer further. I have already answered as fully as I can.

Q. If I understand you it was because you considered it a matter between your client and yourself and between Mr. Cohen and yourself? A. Between my client and myself and whoever held the tax title—not especially Mr. Cohen; but whoever chose to buy
522 it.

Q. Did you still expect that Mr. Cohen's client would lease this property from you, when he had bought up the title of the property, adversely to you? A. I did not expect anything about it. As I say, I have already answered about this matter.

Q. You have not answered this question. You told us you had got a new tenant at a higher rental. I now ask you if you were inactive from the 30th day of September, in the expectation that Mr. Cohen's client would take the property from you at a higher rental, when he had notified you that he was going to buy up an adverse title and deal with you at arms' length? A. As I say, this matter was brought to my attention so suddenly that I did not think of the matter afterwards. I did not know Mr. Cohen's object in purchasing this tax title and I did not ascertain it until Mr. Johnson informed me on the 9th day of October, 1901.

Q. Granting that, do I understand that you were inactive because you did not apprehend that Mr. Cohen would take the stand he did later? A. I did not understand and did not know what Mr. Cohen was going to do with the tax title.

Q. You say the thing was sprung on you so suddenly that you did not think about it. Do you mean that you did not think about the matter on the night of the 30th of September and in the forenoon of the 1st of October, when Mr. Cohen was going on his
523 journey to this distant point? A. I did think of it; yes.

Q. But you did not let your client know that an adverse title was about to be bought up by a man who said he was going to deal with her at arms' length? A. The adverse title had already been bought up by one man and I did not know whether he was going to deal at arms' length or not.

Q. Knowing that one man was going to deal with you at arms' length, and not knowing whether the other was going to do so or not, you did not notify your client or take any action? A. I did not notify my client with regard to this matter until some days after that; I do not know when it was.

Q. If I understand you, the only object that you had in this matter and the only object that Mrs. Kennedy had, so far as you knew, was to get a tenant at a higher rent? A. No; also to get rid of the long term of the lease.

Q. Those were the only reasons that influenced you? A. I do not know what influenced Mrs. Kennedy.

Q. But so far as you know? A. So far as I know her desire was to get another tenant at a higher rental for a shorter time.

Q. Then when you told Mr. Harry King, on the 2nd of October, that they had forfeited their lease for non-payment of taxes and Mrs. Kennedy had determined to forfeit the lease, for that reason, you really meant on that ground and not for that reason? A. Well, you might say that legal ground.

Q. You told Mr. Harry King, on the 2nd of October, that you might give him a lease for a shorter term at a higher rent? A. I may have and most likely I did.

524 Q. You stated in your affidavit, at page 87, that you were going to make a similar proposition to Mr. Cahill, for a new lease to the complainant, conditioned upon the payment of a higher rent and the extinction of Cohen's tax title by the complainant? A. I had that idea, yes.

Q. You had no feeling of hostility towards the Kings at all; but it was merely a question of a higher rent? A. No, I had no feeling of hostility to Mr. King.

Q. When you told Mr. Cahill that you did not care to consider a new lease until the old one was surrendered, you meant that if the old lease was surrendered you would take up the matter of a new lease with him? A. Yes; of course I did not mean to bind my client, but I said I would consider the matter.

Q. You did not mean to induce him to surrender the old lease on a suggestion of a new one and then not give him the new one? A. He said something like that himself to me, and when he put it in that way I told him no.

Q. You were dealing with him in good faith, and meant to give him a new lease if he surrendered the old one? A. I told him I would consider the matter.

Q. When Mr. Tobriner asked you who had purchased this certificate, why did you tell him you thought Myer Cohen had done so? A. Because he had informed me, a couple of days before, that he was going to do it.

525 Q. You had no doubt that he was the person who had done so? A. Well, I did not understand Mr. Tobriner's question at all; and it was some time before I realized what he was talking about.

Q. On page 11 of your testimony you said that Mr. Tobriner asked you why you had told Myer Cohen about this thing, and you told him that you did not tell him? A. I meant by that that he did not get the original information from me.

Q. What did you tell him? A. What did I tell to whom?

Q. To Mr. Tobriner? A. I told him that Mr. Knight had informed Louis Kann about the matter first, and that Kann had informed Mr. Cohen of it.

Q. Was your testimony accurate or inaccurate when you said that you told him you did not tell Cohen? A. I meant to say that I had not given him the original information.

Q. My question now is, what did you tell him? A. To whom do you refer?

Q. Let me read you your answer from page 11 of the record: "Mr. Tobriner then said: 'What the devil did you tell Myer Cohen about this thing for?' I told him I had not told Myer Cohen, that he had learned it before I had from a man named Knight who had informed the Kanns about it." Is that
526 what you told him? A. That is what I told Mr. Tobriner.

Q. As a matter of fact you had told Mr. Cohen about it, and told him before you knew that he knew anything about it. A. Yes; but he informed me that he had known about it before I did.

Q. Repeating Mr. Tobriner's question in a somewhat modified form, why did you tell Myer Cohen about it? A. I have already gone over that I think at length.

Q. There was no reason except what you have already told us? A. No.

Q. If I understand you, on October 9th, Mr. Cohen and Mr. Johnson came to you and told you that if you would get rid of the present tenants and lease the property to them they would take a lease at $300 a month, and surrender the tax certificate; but that if you refused that they would hold the tax title in hostility to your client and possibly bring ejectment proceedings against her? A. I do not think I stated that quite correctly last night. Mr. Cohen came in to me on that day with Mr. Johnson, and Mr. Johnson did the talking. Mr. Johnson came to me and said, to the best of my recollection, that they had this adverse tax title, or that the Kanns had it, and that they proposed to hold it in hostility to my client, Mrs. Kennedy; but that if she would dispossess the present tenant, under the lease, which they had forfeited, they would turn over this tax title to my client at no expense to her, and take the prop-
527 erty at a rental of $300 a month. I did not regard it as an offer. I regarded it as in the nature of a threat and I acted accordingly.

Q. You regarded it as in the nature of a threat? A. Yes; it was an adverse holding to my client, or rather they told me they would use it in that way.

Q. What did they tell you they would do, if you did not eject the Kings and make them a lease? A. They said they would enforce their tax title, or words to that effect—or rather Mr. Johnson said that. He was the spokesman. Mr. Cohen said nothing.

Q. Where did that interview take place? A. In my office.

Q. Was that statement repeated anywhere else in your hearing; did Mr. Johnson and Mr. Cohen make the same statement at any other time or place? A. I think it was subsequently made.

Q. Where? A. I could not tell you when or where; but it was spoken of once or twice.

Q. It was repeated several times? A. Yes.

Q. And always in your office? A. No; I called at Mr. Johnson's

office several times, and I think it was repeated some times in his office.

Q. Do you remember one morning, at Dr. Fry's office, about 9 o'clock, you and Mr. Cohen and Mr. Johnson were there, and this same statement was made then? A. Yes, sir; I think it was.

528 Q. Did you communicate this threat, as you call it, to Mrs. Kennedy? A. I had spoken about it to Mrs. Kennedy previously to that.

Q. Did you also subsequently speak to her? A. I think so.

Q. You told her of this threat? A. Yes; I informed her fully.

Q. What did you tell Mrs. Kennedy on the subject? A. Do you mean the exact words?

Q. As near as you can give them? A. I just informed her as to the state of facts.

Q. Please tell us, as nearly as you can, what you told her? A. I cannot give the words.

Q. Give it in substance? A. The substance is just what I said; that the Kanns had purchased this tax title, and offered to surrender it if we would turn over the property to them and take them as tenants.

Q. And that if you would not? A. If we would not they would hold it adversely and she must take the consequences.

Q. What did Mrs. Kennedy decide to do, when you made that statement to her? A. I advised her to accept the lesser of the two evils, to forfeit the lease and lease the property to the Kanns.

529 Q. I want to invite your attention to paragraph 14 of your answer at page 74: "Answering the 14th paragraph, this defendant states that the averment that the said Marianne A. B. Kennedy instituted a landlord and tenant proceeding against the complainant under pressure and menace brought to bear upon her is absolutely false." Q. Is that correct? A. Yes, sir.

Q. You told her that Mr. Cohen's title would be given her if she would turn the Kings out and give them a lease? A. I told her that.

Q. And if she did not do that they would endeavor to assert the tax title and take her property from her? A. That they might; yes.

Q. And yet there was no pressure or menace brought to bear upon her?

Mr. PERRY: I object to the remarks of counsel. He is entitled to the facts from the witness, but not to comment upon them.

A. There was none, in my opinion.

By Mr. DARLINGTON:

Q. You have said, yourself, that you considered this statement of Mr. Johnson and Mr. Cohen as a threat and that you communicated

it to Mrs. Kennedy; and yet you say there was no pressure or menace brought to bear upon her.

Mr. PERRY: I object to the question as being, doubtless an unintentional misrecitation of the testimony of the witness. I do not recollect that he said he told Mrs. Kennedy that there had been
530 any threats made about the matter.

A. I will have to correct that statement. I did not communicate this to Mrs. Kennedy as a threat at all. I laid the situation before her and told her she had to make a choice of one of these alternatives, and that, in my opinion, she had better accept the lesser of the two evils.

Q. If you put it in that way, do you claim that stating to your client that she was in a position where she had to choose one or the other of two evils, was not subjecting her to pressure? A. I did not so consider it.

Q. Will you let me read you from your affidavit at page 88 of the printed record: "Said Johnson then informed this affiant that the defendants Kann would not sell the said tax title nor release the same, and that, in his judgment, it was valid. He stated, however, that his clients would be disposed to give a quit-claim of the tax title to the client of affiant, Mrs. Kennedy, provided she would give to his clients a long lease of the property upon the terms which they had previously offered to lease the same, and that said tax title would not be released on any other terms. That, if affiant contested said tax title, he might succeed in such contest, but that in the opinion of said Johnson, the tax title was valid and could not be defeated, and that, if it was established, his clients would take the property without compensation to Mrs. Kennedy." Did you
531 communicate that to Mrs. Kennedy? A. I think I communicated the gist of that to her.

Q. By "gist" you mean the fair substance of it? A. I mean the fair substance of it.

Q. Continuing, on the same page: "Said Johnson also stated to affiant that under the statute the said tax deed was *prima facie* evidence of a good title, and that the burden would be upon affiant's client to show any defect therein." Did you communicate that to her? A. I do not know whether I communicated that to her or not.

Q. You cannot remember? A. No; I do not think I went into the question of law.

Q. Continuing to read further from the same affidavit: "If affiant's client, notwithstanding such favorable offer of compromise, should insist upon litigating said tax title with the Kanns he, said Johnson, could see no obligation, legal or moral, upon said Kanns, which would restrain them from insisting upon their legal rights to the utmost, even to the extent of defeating the title of affiant's client to the whole property without compensation." Did you communicate that to Mrs. Kennedy? A. I do not know whether I commu-

nicated those exact words to her, but I gave her the substance of this interview.

Q. You gave her the substance of this which I have just read? A. I think I did.

532 Q. Do you really claim that she acted without pressure and without menace and without threats? A. I do, yes.

Q. Why did you consider Mr. Tobriner's question whether Mr. Cohen would sue you in ejectment, as a foolish one? A. He did not ask me if he would, but he asked me if he had sued.

Q. Why did you regard that as a foolish question? A. Because I thought he would know that as well as I did, by the court records.

Q. And that is the only reason you answered him in the way you say you did? A. Yes; that is the only reason. He asked me if Myer Cohen had brought suit in ejectment against us, and knowing that he khew that had not taken place, from the court records, I regarded the question as a foolish one.

Q. What answer did you make to him? A. I may have used the words he stated, but I do not remember about that. I do not think I did.

Q. You have stated, in answer to a question addressed to you at our last meeting, that Mr. Harry King always acted as though he were the manager of the business, and that you had conversations with him about this property prior to September and October. The occurrences that you refer to were these negotiations for a new lease in the spring of 1901? A. And at other times. Mr. King had been to see me prior to May, 1901.

533 Q. During these negotiations that you had with him in the spring, did you not regard Mr. King as acting as the agent for his mother? A. No; I do not think Mr. King, in his conversation with me, ever spoke in any other way but about what "he" proposed to do; and if he mentioned his mother it was very incidentally.

Q. Let me read you from your affidavit at page 83: "In the spring of 1901 this affiant had occasion to represent the said Marianne A. B. Kennedy in a matter connected with the premises No. 715 Market space, the property occupied by the complainant in this cause, and one Harry King, a son of said complainant, acted as her agent and representative in said matter, and as such agent and representative called upon this affiant and sought to secure a new lease of said premises from this affiant's client." Is that correct? A. He sought to secure it for the firm of Caroline King and Sons.

Q. Did you prepare this affidavit yourself? A. I prepared a part of it.

Q. Who prepared the other part? A. I do not remember. I prepared it myself, mostly.

Q. Who assisted you? A. I was assisted by Mr. Cohen and Mr. Johnson.

Q. Who prepared your answer in this case? A. The same parties.

Q. Can you tell us, substantially what part you took and what part they took in preparing these papers? A. I think most
534 of them was prepared by me, and I went over them with Mr. Cohen, and he corrected one or two misstatements of fact.

Q. Where were these papers prepared? A. They were prepared in my office.

Q. Who was present? A. I was present, alone, and I took them over and we went over them together.

Q. You took them over where? A. I took them over to Mr. Johnson's office.

Q. Where were they typewritten? A. I think Mr. Johnson had them typewritten.

Q. You and Mr. Cohen had gotten through dealing at arms' length with each other, then? A. After the 9th day of October, when this statement was made to me by Mr. Johnson, we dealt together continuously.

Q. Was it after October 9th that you talked to Mr.. Tobriner about giving a new lease to the Kings? A. No, I did not.

Q. You were not a party to any conversation or negotiation about a new lease with the Kings after October 9th? A. No, sir.

Q. What, if you know, led to this visit of Mr. Cohen and Mr. Johnson to your office on October 9th; and why did they come to you and make these threats, as you describe them? A. I suppose Mr. Cohen can explain that to you.

Q. You, yourself, do not know? A. No; I cannot say what motive induced Mr. Cohen to come to my office. I know that
535 he stopped in to see me during that day, or the day before, and said that he was going over to see Mr. W. G. Johnson.

Q. How often had you seen Mr. Cohen between September 30th, and October 9th? A. I think I saw him on the 8th day of October.

Q. What took place at that interview? A. That was the interview in which he told me about this correspondence with Mr. King and Wiltsie. Then I think he came in to see me on the 9th of October, before he went to see Mr. Johnson.

Q. When did you know that Mr. Cohen had secured a deed to this property? A. On the 3rd of October, in the late afternoon.

Q. What did you then do? A. I then had a notice to quit served, the next day.

Q. What did you do with regard to this deed to your client's property; what effort did you make to reach an agreement with Mr. Cohen, or some adjustment by which your client's property might be saved? A. I did not see Mr. Cohen until the 8th day of October.

Cross examination.

By Mr. JOHNSON:

Q. You stated that after some time in the spring, when the Kanns expressed a willingness to rent this property, there was nothing

more said about it between you. Is that correct? A. It was
536 hardly a willingness to rent it. It was just an offhand statement.

Q. Whatever it was, he said something about it in the spring? A. Yes.

Q. And nothing was done about it? A. Nothing was done about it.

Q. You knew both of the Kanns, the defendants in this case, by sight; did you not? A. Yes; I had met them both.

Q. From that day, until the 25th day of September, 1901, state whether or not either of the Kanns spoke to you with reference to the lease of that property? A. No.

Q. Did either of the Kanns write to you with reference to it? A. No, sir.

Q. Did anybody representing either of the Kanns communicate with you on the subject of that property? A. No, sir; there was no communication at all.

Q. You stated that on the 25th of September a man named Knight came in and informed you that this property had been sold for taxes? A. Yes.

Q. Did he tell you then who had bought it? A. He did. He said it was a man named Wiltsie, from Rochester.

Q. Did he state what his reason was for coming and telling
537 you that? A. He wanted to be employed to set aside the tax title *aside*.

Q. Did he make any representation as to its validity? A. He said he thought it could be set aside, or words to that effect.

Q. Between the 25th day of September and the 30th day of September, did either of the Kanns communicate with you, orally or in writing? A. No.

Q. Did you communicate with either of them? A. No.

Q. Did anybody claiming to represent either of them communicate with you in any way? A. Not at all.

Q. I understood you to say that on the 30th of September you went to see Mr. Cohen, and told him that this tax sale had occurred, that your client had the right to forfeit the lease, and that you asked him if his clients were still willing to lease the property on the terms they had suggested to you in the spring. Is that right? A. Yes.

Q. And he told you he would ascertain and let you know? A. Yes; he did.

Q. And subsequently he told you that they would?

Mr. DARLINGTON: In view of the disclosure which the record makes as to the relations between Mr. Johnson and Mr. Webb,
538 and Mr. Johnson's connection with the preparation of Mr. Webb's answer, I submit that the rule which prohibits leading questions is applicable here, and I object to any further examination in this method.

Mr. JOHNSON: I suggest that if counsel wishes to object to the

question as leading he may do so without criticising counsel. If there is any objection to the questions as leading I shall endeavor to put them in proper form. I was merely rehearsing a statement which the witness has made in his testimony this evening, for the purpose of bringing his attention to a particular matter.

Mr. DARLINGTON: If that is what counsel is doing, I object to it on the ground that to rehearse the testimony of a witness is obnoxious to the rules of evidence.

By Mr. JOHNSON:

Q. I want you to state whether or not, at any time, on the 30th day of September, 1901, you told Mr. Cohen that Mr. Knight had claimed that this tax certificate was in any respect defective and could be defeated? A. I do not think I did.

Q. After the interview between Mr. Cohen and yourself, at which he stated his clients were willing to lease the property, where did you next go on that day? A. I went to see Mrs. Kennedy in the afternoon.

Q. Did you see anyone else? A. You mean at her house?

Q. Did you go to see any one else? A. I had a short talk with Dr. Fry afterwards, at his house.

539 Q. Do you know whether he bore any relation to Mrs. Kennedy? A. He was no blood relation to her.

Q. Do you know anything about his personal relations to her? A. They were very intimate.

Q. When did you next see Mr. Cohen? A. I saw him that afternoon about 6 o'clock, on my front door steps.

Q. Where? A. In front of my house on that afternoon, at 6 o'clock.

Q. Were you in the house at the time? A. No; I was just coming up to the house, and he was standing on the front door step.

Q. Had he gained admittance to the house? A. No, he had not.

Q. I wish you would state, as clearly as you can, what Mr. Cohen then said to you? A. I have already gone over that very much in detail.

Q. I would like you to state it. A. Do you want me to state it again?

Q. If you please. A. To the best of my recollection, as I came up to the house, Mr. Cohen came to me and said: "I have come to inform you that I am going up to Rochester to buy that tax title, and we are now dealing at arms' length." I expostulated with him.

540 Q. Do you remember what you said? A. Yes; I told him I did not want him to act upon the information he had received from me. Then he said that he had not received it from me, that he knew about it before I did, and that Mr. Knight had told the Kanns about it, and they had sent Mr. Knight to me.

Q. Did he state whether or not he would go, or use any expres-

sion to indicate whether he would go? A. Yes; he gave me to understand he was going.

Q. Can you remember what he said? A. He said he was going. I do not remember anything else.

Q. Can you tell us whether his manner was positive and emphatic? A. Yes; most positive. He told me he was going.

Q. Have you stated what time that was? A. It was about six o'clock, as near as I can make it.

Q. Do you remember what day of the week it was? A. It was Monday, September 30th.

Q. You stated a while ago that Mr. Cohen came to your office on the 8th day of October. A. The 8th day of October, I think, was the next time I saw him.

Q. I want you to state whether or not, between the evening of the 30th of September and the 8th day of October, either of the Kanns communicated with you in person or by writing? A. They
541 did not.

Q. State whether or not, during that same period of time, you communicated with either of them personally or in writing? A. I did not.

Q. State whether or not any person, other than Myer Cohen and myself, ever communicated with you with reference to this matter, claiming to represent either of the Kanns? A. I do not remember any. I am certain no one ever has.

Q. Did you have any communication with anybody claiming to represent the Kanns, other than Myer Cohen and myself? A. I have not.

Q. Do you remember what you were doing in your office when I called there upon the 9th day of October with Mr. Cohen? A. I have an idea that I was preparing a proposition to submit to Mr. Cahill.

Q. Do you know whether you were or not? A. I think I was at that time.

Q. Do you know where that proposition was? A. How do you mean?

Q. Was it on the floor, or in the air, or in your desk or shut up, or where? A. I think I had it in rough notes on my desk at that time.

Q. Do you remember what you did with it, after I an-
542 nounced to you the position of the Kanns? A. I think I threw it away.

Q. Where? A. Into the waste-paper basket?

Q. Did you do anything to it before you threw it away? A. I don't know whether I tore it up or not. I know I remarked at the time that your proposition changed the whole situation.

Q. State whether or not any one had expressed to you the opinion that Mr. Knight's opinion of this tax certificate was incorrect, prior to your interview with me on the 9th day of October?

Mr. DARLINGTON: I object to the question as calling for hearsay testimony, and as being generally incompetent.

A. Nobody had expressed such an opinion to me.

By Mr. JOHNSON:

Q. I would like you to state whether or not you had informed yourself of any of the facts pertaining to the tax certificate, or as to the law affecting its validity, by that time? A. I had made no specific examination into the facts.

Q. You have stated, in answer to a question by Mr. Darlington this evening, that you informed your client, Mrs. Kennedy of the substance of your interview with me on the 9th day of October, and that you advised her to accept the proposition of the Kanns, as the lesser of two evils. I want you now to state whether or not you subsequently informed me whether my proposition of compromise with reference to the tax title would or would not be ac-
543 cepted by you. A. I think I did inform you that Mrs. Kennedy had decided to accept your proposition.

Q. You have stated that your answer and affidavit in this case were prepared in conference with me and Mr. Cohen. I will ask you to state in whose handwriting the manuscript draft of these papers was, which you brought to my office? A. The substance and almost the whole of the answer and affidavit was prepared by me.

Q. That is not an answer to my question. My question is in whose handwriting were the manuscript drafts of your answer and affidavit, which you said you brought to my office. A. They were in my handwriting.

Q. I want you to state whether or not you received from me any suggestion as to any matter of fact contained in either one of these papers? A. I did not.

Q. Had you at that time any typewriter; that is did you have a machine for typewriting in your office? A. Yes, I had an old one.

Q. What was the reason for having the papers typewritten in my office? A. Because you had a typewriting machine and somebody to work it, and I did not.

Q. I will ask you to state whether or not any of the facts contained in your answer and affidavit were furnished by Mr.
544 Cohen. I refer to facts stated of your own knowledge? A. They were all stated of my own knowledge.

Q. Were any of those facts furnished by Mr. Cohen? A. I think not.

Q. I will ask you to state whether or not you ever spoke to me or I ever spoke to you with reference to this matter at any time prior to the 9th day of October? A. No, you did not, nor did I speak to you.

Q. Had I ever written to you on the subject? A. No.

Q. Had you ever written to me? A. I had not.

Q. Did you have any communication with me, in any way, directly or indirectly, on the subject? A. Not prior to the 9th day of October, 1901.

Q. Do you know of my having any knowledge of any of the facts in the case prior to that day? A. I do not.

Q. I will ask you to state whether or not you conferred with me with respect to any of the matters and things connected with this matter, until after you had notified me of Mrs. Kennedy's acceptance of the proposition of compromise of the Kanns? A. I did not.

Q. Do you remember, at the time you brought the rough draft of your affidavit in this case and showed it to me, of having exhibited to me a number of tax bills on this property? A. Yes; I think I did.

Q. Do you remember having called my attention to a
545 memorandum on the face of the tax bills, made by the collector of taxes, as to the check by which they were paid? A. Made on the taxbills themselves?

Q. Yes. A. No, I do not.

Q. You do not recall that? A. No, sir.

Q. Do you know of any relations which Swormstedt and Bradley had to Mrs. Kennedy's property? A. Mr. Bradley had charge of her property as agent.

Q. What was the business of that firm? A. Real estate.

Q. You stated, in answer to a question by Mr. Darlington, that Mr. Cohen, on the occasion of his telling you that he was going to buy this tax title, did not inform you what use he intended to make of it when he acquired it. I wish to ask you to state whether or not you asked Mr. Cohen what use he intended to make of it, on that occasion? A. I do not remember whether I did or not. I remember Mr. Cohen making the remark that the very least that could happen was that he would be paid. I think he said Harry King would pay him his expenses and something for his trouble.

Q. That Harry King would do what? A. That Harry King would have to.

Q. Do you think of any other remark he made? A. No; I do not know of any other remark.

546 Cross examination.

By Mr. BRADLEY:

Q. You stated in your direct examination that, in one of your conversations with Mr. King in regard to a new lease, either you or he made some reference to incorporating into the new lease the right to purchase at the termination of the lease, subsequent to the death of Mrs. Kennedy. Do you mean that that conversation was subsequent to the death of Mrs. Kennedy, or that the contemplated purchase was to be subsequent to the death of Mrs. Kennedy? A. The conversation was held in May, 1901. Mr. King came with the proposition or suggestion that he be given a right to purchase after Mrs. Kennedy's death; and I informed him that that would give him no more right than any other purchaser had, and it would be a useless thing to put into the lease.

Q. Who suggested that? A. Mr. King came to me with that suggestion, and, as I understood him, he had talked it over with Mrs. Kennedy. My letter refers to it.

Q. What was it he said that led you to believe he had talked it over with Mrs. Kennedy? A. He told me he had seen Mrs. Kennedy and that he came to me at Mrs. Kennedy's suggestion.

Q. Did he know, so far as you know, whether you were Mrs. Kennedy's executor? A. No, I think not.

547 Q. You have stated in your cross-examination that you were informed by Mr. Knight, on the 25th day of September, 1901, that Mr. Wiltsie had purchased the tax certificate for the tax sale on these premises, No. 715 Market space? A. Yes, I said that.

Q. How long prior to the 25th of September, 1901, had you represented Mrs. Kennedy as her attorney? A. I had seen Mrs. Kennedy and transacted legal business for her for a long while—I will say ever since my father died.

By Mr. PERRY:

Q. For how many years? A. About 7 years. My father died in March, 1896, and it was since that time.

By Mr. BRADLEY:

Q. Did you do anything towards informing yourself as to the accuracy of Mr. Knight's statement? A. Yes; the next day I visited the tax office and found out that it was so, and got a letter from the tax office to that effect.

Q. And yet, notwithstanding that fact, you did not say anything to Mrs. Kennedy about that tax sale until some days after the 30th of September? A. No; I spoke to Mrs. Kennedy about it the next day.

Q. Did you not state, in your cross examination, that you did not notify Mrs. Kennedy of that fact until some days after your conversation with Mr. Cohen? A. I think not. I could not have

548 said that, because that is at variance with the fact.

Q. About how long was it after the 25th of September, that you informed Mrs. Kennedy of the fact that this man Wiltsie held the tax title? A. The next day.

Q. When was it that you stated to Mr. Cohen that such was the fact? A. The 30th of September, 1901.

Cross examination.

By Mr. DARLINGTON:

Q. At page 85 of the printed record, in your affidavit you said that Mr. Cohen even suggested to you the buying up of this tax certificate from Mr. Wiltsie, and you replied that it was not necessary. What did you mean by that? A. He made some such suggestion.

Q. Why did you tell him it was not necessary to buy up this cer-

tificate from Mr. Wiltsie? A. I do not remember. I think that was just an off-hand remark like his.

Q. And even the suggestion of Mr. Cohen to you that you ought to get that outstanding cloud against your client's title, did not strike you with any more force than that? A. No; I did not intend to buy it at that time. Of course I intended to attend to it when I was ready to do so.

Q. Then when Mr. Cohen told you he was going to buy it on the same day, why was it, if you intended to attend to it some time, you didn't take it up before Mr. Cohen got it?

549 Mr. PERRY: I object to this, because the witness has repeatedly answered why he did it.

A. I can only answer that as I did before, that I did not regard the tax title in Mr. Cohen's hands as any more dangerous than it was in Wiltsie's hands.

Q. You tell us now that when Mr. Cohen suggested to you to buy up this outstanding lien you said it was not necessary, and that you did intend to attend to it later. If you did intend to attend to it later, why was it, when you had notice that Mr. Cohen was going to buy it up adversely to your client and hold it at arms' length, you did not then take it up? A. I can only answer in the same way as I did before, that I did not regard the tax title in Mr. Cohen's hands as any more dangerous than in the hands of Mr. Wiltsie.

Q. And although he told you he was going to buy it up from Wiltsie and hold it adversely to you? A. It was already held adversely to me.

Q. And on that day you thought it was not necessary to buy it from Mr. Wiltsie because you would attend to it later, when Mr. Cohen, on that same day, had suggested to you to buy it from Mr. Wiltsie and you thought it was not necessary, because, as you now say, you thought you could attend to it later? A. Yes.

Q. How was it when you found that Mr. Cohen was going to buy it up and put it out of your power to buy it, so far as Wiltsie was concerned?

550 Mr. PERRY: I object to that as not being an accurate statement. It was no more out of his power to attend to it after Mr. Cohen had bought it than it was when Mr. Wiltsie had it.

Mr. DARLINGTON: Although Cohen had told him he was going to buy it and hold it adversely to him, and at arms' length?

The WITNESS: There was nothing said about adversely.

By Mr. DARLINGTON:

Q. What did you understand Mr. Cohen to mean when he said he was going to buy it and deal with you at arms' length? A. I suppose, in that sense, it could be held to mean adversely.

Q. What led up to Mr. Cohen's remark that Harry King would have to pay him for his expense and trouble? A. I don't know.

Mr. Cohen made that remark to me. I understood it to mean that he was going to buy it on speculation.

Q. As against the Kings?

Mr. PERRY: He did not say that.

By Mr. DARLINGTON:

Q. I am asking you that question. Was he buying it on speculation expecting the Kings to take it up, and expecting to make the Kings take it up? A. Possibly so.

Q. Do you know Mr. A. B. Ruff, the cashier of the Central national bank? A. Very well.

551 Q. Did you have any talk with him about recalling this tax certificate from Mr. Wiltsie, by telephone, when Mr. Cohen was in Rochester? A. Not at all.

Q. Did you or not call upon him, in the early part of November, and ask him not to give any information to anybody respecting the time when Wiltsie telephoned for a return of the certificate? A. I do not remember doing so, and I do not think it possible. I have no recollection of any such thing. Do you say in 1901?

Q. Yes; just after this occurrence. A. No; I have no recollection of seeing Mr. Ruff about this matter at all.

Q. You think you did not go to the bank and talk with him about the recall of the certificate, and ask him not to give any information about it? A. I do not think I did. I have no recollection of doing so.

Q. There have been quite a number of typewritten letters, written by yourself, introduced here. Where were they typewritten? A. I do not remember.

Q. I mean your letters to Mr. Tobriner and myself, this long correspondence, and these propositions of compromise, and all that; where were they typewritten? A. I do not remember.

Q. Were they not typewritten in your office? A. Some of them were, and some times I go to different typewriters to do work

552 for me. I have typewriters in the Columbian Law building, and I employ different ones at different times.

Q. You do not recall whether all of these letters were written in your own office and on your own machine? A. No, I do not.

Q. You say that all of the facts stated in your affidavit, were of your own knowledge and were not derived from Mr. Cohen? A. Yes; although we may have talked together over some of the facts.

Mr. JOHNSON: That was not my question. My question had reference to the facts stated on his own knowledge, and not to the facts stated in the affidavit. I carefully framed the question.

Mr. DARLINGTON: I am not referring to the question but to his answer.

By Mr. DARLINGTON:

Q. I want to call your attention to your affidavit on page 90.

From whom did you learn the facts there alleged in regard to the proceedings in equity suit No. 19,338? A. I looked at the original papers.

Q. Who put you on the track of them? A. I think Mr. Cohen mentioned that fact to me.

Q. At the bottom of page 90 and the top of page 91, of the printed record, you refer to a correspondence between Harry King and Mr. C. H. Wiltsie, with reference to this tax certificate. From whom did you get that information? A. Mr. Cohen showed me that correspondence.

553 Q. I want to call your attention to an expression in your answer, at page 69, as follows: "This respondent is informed and believes that the said tax sale was an actual one, and that the purchase thereof by said Wiltsie was actual." Did you put that into the answer, or was that suggested by some one else? A. I think I put that in.

Q. What was your object in alleging it was an actual sale? A. That was just what I meant.

Q. What was your object in alleging the sale was an actual one, when you were representing the person against whom the sale was sought to be asserted? A. I meant that it was actually made by the tax office.

Q. I call your attention to the language again: "That said tax sale was an actual one, and the purchase made by said Wiltsie was actual." I ask you what object you had, as representing the person against whom that sale was asserted, in making that allegation. A. I think that is my own affair. What object I had in making that allegation is between my client and myself.

Q. You were your own client when this answer came in? A. Yes; that is so. I had forgotten that I was acting as attorney there.

Q. This answer appears to have been made in April
554 about six months after this transaction. I call your attention to page 74 of your answer: "This defendant has not been able to inform himself sufficiently as to the facts and the law to be able to say whether the said tax sale is valid or not." This was at a time when you were the representative of the estate. Before answering this bill, the object of which was to have this tax sale declared invalid, in aid of your estate, you did not take the time or trouble to see whether the facts or the law or either were correctly stated? A. I can answer that by saying that I deny the right of this present complainant to compel me to litigate this tax title in this proceeding. That is a question which I can take up with the person who holds it.

Q. You were aware that the bill alleged that the tax assessment and tax advertisement and tax sale were all made in the name of a person who had not owned the property for 25 or 30 years. Did you not, within six months, have an opportunity and time to determine whether that was true or not, so that you could admit it, in aid of your own client? A. I am not contesting that tax title in

this case. I am testing the forfeiture of the lease, and, as I say, when I wish I will take up that question of the tax title with the person who owns it, and defend my estate at that time and at my own instance and option.

Q. On page 72 of your answer you stated that you did not learn, until after the 3rd of October, that the tax certificate was at
555 a bank in this city subject to redemption. From whom did you learn that, after October 3rd? A. I have already told you that I learned that from Mr. Cohen.

Q. Do I understand that you destroyed this proposed proposition to Mr. Cahill at the interview with Mr. Cohen and Mr. Johnson on October 9th? A. Yes, I think so.

Q. Without consulting your client? A. Yes. Of course before I submitted that proposition to Mr. Cahill I was going to show it to Mrs. Kennedy and get her approval. We had talked over the matter informally, but had come to no definite conclusion about it.

Redirect examination.

By Mr. PERRY:

Q. Please state, in detail, what sources of information you had, before you made the averment in your affidavit that Henry King, Jr., during his lifetime, had not paid any of these taxes, and that Mrs. Kennedy had paid them?

Mr. DARLINGTON: I object to that, because it has been gone into fully in direct and cross examination.

Mr. PERRY: It was not gone into on the direct at all. It was a voluntary statement made by the witness.

Mr. DARLINGTON: It was a part of his direct examination and on his cross examination he was even allowed to tell what a clerk had said to him.

Mr. PERRY: I think the question a proper one.

A. I had several conversations with Mrs. Kennedy in
556 which she produced tax bills and said that she had paid them, and that Mr. King had neglected to pay the taxes.

Q. Where are those tax bills, if you know? A. I have them with me.

Q. Will you produce them? A. Yes.

(The witness produced the tax bills.)

Q. Are these the bills which you speak of? A. Yes, sir.

The above mentioned tax bills were offered in evidence by counsel for the defendant Webb, and the same are marked Exhibits H. R. W. 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, and 19.

The above mentioned tax bills are in the words and figures following, to wit:

557 EXHIBIT H. R. W. No. 8.

Pay collector of taxes, D. C.

First half of tax payable in November, 1890; two per cent. penalty on the first day of December, 1890, and a like penalty on first day of each succeeding month. Second half payable in May, 1891; two per cent. penalty on the first day of June, 1891, and a like penalty on the first day of each succeeding month.

Washington city, assessor's office.

Folio 283.

Maria T. Gillis to the District of Columbia, Dr., for real estate tax for year ending June 30, 1891, payable Nov., '90, and May, '91.

Tax, $1.50 per [illegible] ssed valuation.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432.....	Of 3 S. A.	$1080 11643	$6000	$18714	All

Collector's office, Nov. 29, 1890, District of Columbia.

To first half of tax..... $140.36
To penalty of — per cent..... .....
Advertising..... ....

Total.....

Received payment,

E. G. DAVIS,
Collector, D. C.

558 EXHIBIT H. R. W. No. 9.

Pay collector of taxes, D. C.

First half of tax payable in November, 1890; two per cent. penalty on the first day of December, 1890, and a like penalty on first day of each succeeding month. Second half payable in May, 1891; two per cent. penalty on the first day of June, 1891, and a like penalty on the first day of each succeeding month.

Washington city, assessor's office.

Folio 283.

Maria T. Gillis to the District of Columbia, Dr., for real estate tax for year ending June 30, 1891, payable Nov., '90, and May, '91.

Tax, $1.50 per $100 assessed valuation.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432	Of 3 S. A.	$1080 11634	$6000	$18714	All

To 2nd half of tax $140.35
To penalty of — per cent .....
Advertising .....

Total .....

Received payment,

E. G. DAVIS,
Collector, D. C.

{ Collector's office, Paid May 29, 1891, District of Columbia. }

559 EXHIBIT H. R. W. No. 10.

Pay collector of taxes, D. C.

First half of tax payable in November, 1891; two per cent. penalty on the first day of December, 1891, and a like penalty on the first day of each succeeding month. Second half payable in May, 1892; two per cent. penalty on the first day of June, 1892, and a like penalty on the first day of each succeeding month.

Washington city, assessor's office.

Folio 278.

Maria T. Gillis to the District of Columbia, Dr., for real estate tax for year ending June 30, 1892, payable Nov., '91, and May, '92.

Tax, $1.50 per $1.00 assessed valuation.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432.....	Of 3 S. A.	$1080 11634	$6000	$18714	All

To second ½ of tax..... .... $140.35
To penalty of — per cent.....
Advertising.....

Total..... ....

Received payment,

E. G. DAVIS,
Collector, D. C.
By COLLINS.

{ Collector's office,
May 31, 1892,
District of Columbia. }

560 EXHIBIT H. R. W. No. 11.

Pay to the collector of taxes, D. C.

First half of tax payable in November, 1892; two per cent. penalty on the first day of December, 1892 and a like penalty on first day of each succeeding month. Second half payable in May, 1893; two per cent. penalty on the first day of June, 1893, and a like penalty on the first day of each succeeding month.

Washington city, assessor's office.

Folio 282.

Maria T. Gillis to the District of Columbia, Dr., for real estate tax for year ending June 30, 1893, payable November, '92, and May, '93.

Tax, $1.50 per $100 assessed valuation.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432	Of 3 S. A	$1080 11634	$6000	$18714	All

To second half of tax..... ..... $140.35
To penalty of — per cent.....
Advertising..... .....

Total .....

Received payment,

E. G. DAVIS,
Collector, D. C.

{ Collector's office, May 31, 1893, District of Columbia. }

561 EXHIBIT H. R. W. No. 12.

Pay to the collector of taxes, D. C.

First half of tax payable in November, 1893; two per cent. penalty on the first day of December, 1893, and a like penalty on first day of each succeeding month. Second half payable in May, 1894; two per cent. penalty on the first day of June, 1894; and a like penalty on the first day of each succeeding month.

Washington city, assessor's office.

Folio 295.

Maria T. Gillis to the District of Columbia, Dr., for real estate tax for year ending June 30, 1894, payable November, '93, and May, '94.

Tax, $1.50 per $100 assessed valuation.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432	Of 3 S. A	$1260 12465	$6000	$19725	All

To first half of tax..... ..... $147.94
To penalty of — per cent.....
Advertising..... .....

Total .. ..

Received payment,

E. G. DAVIS,
Collector, D. C.

Collector's office,
Nov. 29, 1893,
District of Columbia.

562 EXHIBIT H. R. W. No. 13.

Pay to the collector of taxes, D. C.

First half of tax payable in November, 1893; two per cent. penalty on the first day of December, 1893, and a like penalty on first day of each succeeding month. Second half payable in May, 1894; two per cent. penalty on the first day of June, 1894; and a like penalty on the first day of each succeeding month.

Washington city, assessor's office.

Folio 295.

Maria T. Gillis to the District of Columbia, Dr., for real estate tax for year ending June 30, 1894, payable November, '93, and May, '94.

Tax, $1.50 per $100 assessed valuation.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	All.
432	Of 3 S A	$1260 12465	$6000	$19725	

To second half of tax $147.94
To penalty of — per cent.....
Advertising.....

Total .....

Received payment,

E. G. DAVIS,
Collector, D. C.,
By COLLINS.

{ Collector's office,
Paid May 31, 1894,
District of Columbia. }

563 EXHIBIT H. R. W. No. 14.

Pay to the collector of taxes, D. C.

All of tax payable in May, 1895; one per cent. penalty on first day of June, 1895, and a like penalty on the first day of each succeeding month.

1895. *Taxes Year Ending June* 30. 1895.

Washington city.

Tax, $1.50 per $100 assessed valuation.

Folio 290.

ASSESSOR'S OFFICE, 5/1, 1895.

Maria T. Gillis to the District of Columbia, Dr.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432	Of 3 S. A	$1260 12465	$6000	$19725	

To all of tax..... $295.88
To penalty of — per cent.....
Advertising.....

Total .....

Received payment,

E. G. DAVIS,
Collector, D. C.

{ Collector's office,
Paid May 31, 1895,
District of Columbia. }

564 EXHIBIT H. R. W. No. 15.

Pay to the collector of taxes, D. C.

First half of tax payable in November, 1895; one per cent. penalty on the first day of December, 1895, and a like penalty on first day of each succeeding month. Second half payable in May, 1896; one per cent. penalty on the first day of June, 1896; and a like penalty on the first day of each succeeding month.

1896. *Taxes Year Ending June* 30. 1896.

Washington city.

Tax, $1.50 per $100 assessed valuation.

Folio 317.

ASSESSOR'S OFFICE, 11/1, 1895.

Maria T. Gillis to the District of Columbia, Dr.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432	Of 3 S. A	$1260 12465	$6000	$19725	All

To first half of tax..... $147.94
To penalty of — per cent.....
Advertising.....

Total.....

Received payment,

E. G. DAVIS,
Collector, D. C.,
By COLLINS.

{ Collector's office, Paid Nov. 30, 1895, District of Columbia. }

565 EXHIBIT H. R. W. No. 10

Pay to the collector of taxes, D. C.

First half of tax payable in November, 1895; one per cent. penalty on the first day of December, 1895, and a like penalty on first day of each succeeding month. Second half payable in May, 1896; one per cent. penalty on the first day of June, 1896; and a like penalty on the first day of each succeeding month.

1896. *Taxes Year Ending June* 30. 1896.

Washington city.

Tax, $1.50 per $100 assessed valuation.

Folio 317.

ASSESSOR'S OFFICE, *Apr.* 18, 1896.

Maria T. Gillis to the District of Columbia, Dr.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432.....	Of 3 S. A	$1260 12465	$6000	$19725	All

To second half of tax..... $147.94
To penalty of — per cent.. .....
Advertising.....

Total.....

Received payment,

E. G. DAVIS,
Collector, D. C.

{ Collector's office,
Paid May 29, 1896,
District of Columbia. }

566 EXHIBIT H. R. W. No. 17.

Pay to the collector of taxes, D. C.

First half of tax payable in November, 1896, one per cent. penalty on the first day of December, 1896, and a like penalty on first day of each succeeding month. Second half payable in May, 1897, one per cent. penalty on the first day of June, 1897; and a like penalty on the first day of each succeeding month.

1897. *Taxes Year Ending June* 30. 1897.

Washington city.

Tax, $1.50 per $100 assessed valuation.

Folio 325.

ASSESSOR'S OFFICE, *Nov.* 2, 1896.

Maria T. Gillis to the District of Columbia, Dr.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432..	Of 3 S. A	$1260 11634	$5500	$18394	All

To first half of tax..... $137.96
To penalty of — per cent..... .....
Advertising.....

Total.....

Received payment, E. G. DAVIS,
Collector, D. C.

{ Collector's office, Paid Nov. 30, 1896, District of Columbia. }

567 EXHIBIT H. R. W. No. 18.

NOTICE.—This bill does not include arrears.

Form No. 1.

Pay to the collector of taxes, D. C.

First half of tax payable in November, 1896, one per cent. penalty on the first day of December, 1896, and a like penalty on first day of each succeeding month. Second half payable in May, 1897, one per cent. penalty on the first day of June, 1897; and a like penalty on the first day of each succeeding month.

1897. *Taxes Year Ending June* 30. 1897.

Washington city.

Tax, $1.50 per $100 assessed valuation.

Folio 325.

ASSESSOR'S OFFICE, *Apr.* 13, 1897.

Maria T. Gillis to the District of Columbia, Dr.

Square.	Lot.	Value of lot.	Value of improvements.	Total assessed value.	
432	Of 3 S. A	$1260 11634	$5500	$18394	

[On the margin:] For further description of property, see records and plats.

To second half of tax..... $137.95
To penalty of — per cent.....
Advertising.....

Total.....

Received payment,

E. G. DAVIS,
Collector, D. C.,
By C.

{ Collector's office,
Paid May 29, 1897,
District of Columbia. }

568 EXHIBIT H. R. W. No. 19.

Book 13, folio 256.

Office of the Commissioners of the District of Columbia, special assessment division.

464 La. Ave. N. W., 2d floor.

WASHINGTON, D. C., *July* 1, 1896.

Maria T. Gillis—sub. lot No. A, square No. 432, abutting 24.17 feet on Market space—is charged upon the books of this office for special improvements as follows:

For work done under act of Congress 7th August 1894 2nd March, 1895.

	Dollars.	Cts.
24.17 ft. sidewalk—all instalments.....	45	15
Interest at 8 per centum per annum from ——		
Costs.....		
Total.....		

Received payment,

E. G. DAVIS,
Collector of Taxes.

[On the margin:] R. E. Bradley.

Special assessment office,
Sep. 1, 1896,
District of Columbia.

The acts of Congress relative to special assessments provide as follows:

One-third of the assessment shall be paid within 60 days from date of service of notice of assessment.

One-third shall be paid within one year from date of service.

One-third shall be paid within two years from date of service.

Interest shall be charged at the rate of 8 per centum per annum from the date of service of notice upon all amounts that re-
569 main unpaid at the expiration of 60 days after date of service.

Should this property become subject to sale for any other assessment or tax whatever, then this assessment will become immediately due and payable, and the property may be sold therefor, together with interest and costs.

Should this assessment or any part thereof, remain unpaid at the expiration of two years from the date of service of notice of this as-

sessment, this property will be subject to sale therefor with interest and costs.

These provisions of law will be enforced.

J. W. DANIEL,
Special Assessment Clerk, D. C.

{ Collector's office, Paid Sep. 1, 1896, District of Columbia. }

N. B.—If this property no longer belongs to you, please return this notice to this office with the name and address of the present owner.

(MARGINAL NOTE.)—This is the very first notice served upon me for such assessment and therefore the interest has not accrued.

By Mr. PERRY:

Q. In whose possession were those tax bills, when you saw them? A. Some of them were in the possession of Mrs. Kennedy, and some of them in the possession of Mr. Bradley.

570 Q. On their face they are receipted tax bills? A. Yes, sir.

Q. What was your information as to whom they were paid by? A. Mrs. Kennedy informed me that she had paid them.

Q. What additional search did you make to inform yourself, before making this averment in your affidavit? A. I got word from the tax collector, by whom the taxes had been paid.

Q. What was your information from him in that regard? A. My information was that the greater part of the taxes from 1890 down to December 31, 1897, were paid by the check of Swormstedt and Bradley, or by Robert E. Bradley, and some of them were paid in cash. This is the paper I received. (The witness produces a paper.)

Mr. PERRY: I offer this paper in evidence.

The above-mentioned paper is marked "Exhibit H. R. W. No. 20" and is in the words and figures following, to wit:

(EXHIBIT H. R. W. No. 20.)

" Plat —. Coupon —. Certificate —.
Subdivision —.

OFFICE OF ASSESSOR, D. C., ——, 1901.

Applicant —— ——.
Sub lot A of lot 3.
Square 432.
Description ——.
Maria T. Gillis.

571 Square feet —; value land, $—; value improvements, $—.

Year.	Tax due.			To whom assessed.	Folio.
1881					
1882					
1883					
1884					
1885					
1886					
1887					
1888					
1889					
	44/205	11/30/89..	$140.36-	C'k Swormstedt & Bradley....	
1890	44/420	5/31/90..	$140.35	Don't know.....	
	46/155	11/29/90..	140.36-	Swormstedt & Bradley.....	
1891	46/455	5/29/91..	140.35	" "	
	51/240	11/30/91..	140.3	P'd by Swormstedt & Bradley.	
1892	50/294	5/31/92..	140.35	" " "	
	55/ 29	11/16/92..	140.36	" " "	
1893	53/280	5/31/93..	140.35	" " "	
	60/ 21	11/29/93..	147.94	Don't know.....	
1894	60/228	5/31/94..	147.94	P'd by Swormstedt & Bradley.	
1895	65/ 25	5/31/95..	295.88	" " "	
	70/217	11/30/95.	147.94	P'd by c'k Swormstedt & Bradley.	
1896	70/230	5/29/96..	147.94	" " R. E. Bradley..	
	75/ 29	11/30/96..	137.95	" " " " ..	
1897	75/ 47	5/29/97..	137.95	" " " " ..	
	76/110	12/31/97..	137.96	Don't know.....	
1898	48/247	5/24/01..	9.45	" "	
Lot 3					
1899	45/247	5/24/01..	18.90	" "	
Lot 3					
1900	92/259	7/24/1900	268.41	P'd by C. King & Son	
1901	93/113	5/24/1901	268.41	Don't know.....	
		Paid	by cash.		
1902					

572 By Mr. PERRY:

Q. You say that, at that time, they were her agents? A. They were her agents at that time. Mr. Robert E. Bradley was some connection of Mrs. Kennedy's.

Q. I understood you to say that you were informed by one of that firm that the money had been furnished by Mr. King. Q. A clerk in Mr. Robert E. Bradley's office said that he thought Mrs. Kennedy had paid these taxes and then Mr. King had reimbursed her. I went to see Mrs. Kennedy and told her this, and asked her if she was not mistaken about it, and she said, most positively, no, that she had paid the taxes.

Q. And that was the information upon which you based the averment in your affidavit? A. Yes, sir.

Q. You say that you had been acting as Mrs. Kennedy's attorney from the time of the death of your father in 1896, up to the time of her death? A. Yes; and I will say in that connection that the only service I rendered her was the drawing of her will two or three times, and once or twice she consulted me or sent Mr. King to me in regard to this property.

Q. In May, 1901, you had had this interview, of which you have spoken, with Harry King? A. Yes, sir.

Q. In regard to a new lease—you have told us about that? A. Yes, sir.

573 Q. Who referred Mr. King to you on that occasion? A. Mr. King informed me that Mrs. Kennedy had sent him to me.

Q. Did you have a verification of that statement from Mrs. Kennedy? A. Yes; I saw her that same evening.

Q. From that time until the time that Mr. Knight, in September, 1901, informed you of this tax sale, did you have anything to do with this property? A. Yes. There was a question about some alterations.

Q. I do not care about the details? A. Yes; I did have some. I saw Mr. King on one occasion, I think, if not two.

Q. Had anything occurred, prior to the time you learned from Mr. Knight of this tax sale, and the issuance of the tax certificate, to induce you to question, in any way, this King lease? A. Nothing at all.

Q. So that when Mr. Knight came to see you in September, 1901, you assumed that was an existing lease? A. Yes, I did.

Q. On what day was it that he came to see you? A. On the 25th of September, 1901.

Q. And then he gave you this information that the property had been sold more than two years prior thereto, and that a tax certificate had been issued and had become irredeemable?

Mr. DARLINGTON: I object to the question as being leading, and as being a reiteration of what we have had over and over
574 again in the direct and cross examination, and as being in no sense proper re-direct examination.

A. I do not remember that Mr. Knight said anything to me about the tax certificate being irredeemable. I ascertained that fact the next day at the tax office.

Q. At any rate he gave you information in respect of it? A. Yes.

Q. The next day what did you do? A. The next day I visited the tax office and examined into the facts, and after some difficulty, I found that the statement was right.

Q. When did you communicate to Mrs. Kennedy the result of that search? A. The same evening. I saw her that afternoon, on the 26th of September.

Mr. PERRY: I think it proper to state, on the record, that I deem this redirect examination perfectly competent, in response to the cross-examination of Mr. Darlington in regard to the objects and motives of this witness.

Mr. DARLINGTON: I submit that to ask the same questions over and take the same answers again, simply prolongs the examination, to no purpose.

By Mr. PERRY:

Q. As Mrs. Kennedy's adviser, I will ask you what was your position with respect to this lease, when you made this discovery, with reference to the proper line of conduct for her to pursue. A. My position was that the lease had been forfeited and that she
575 should so act.

Q. Did you or not communicate that advice to her? A. I did.

Q. What was the next thing that happened in this connection? A. That was on the 26th of September.

Q. What was the next thing that happened in that connection? A. The next thing was my writing to her the note of the 27th, as I was leaving for New York. I had neglected to tell her that if she was going to forfeit the lease she was not to receive the rent. Not knowing when the rent would come due I was afraid that it might be paid, and that she might find she had waived her rights.

Q. What was the next thing, after that? A. The next thing was my receiving her letter on Monday morning, September the 30th, which has been put in evidence.

Mr. DARLINGTON: It is understood that my objection applies to all of this line of examination, without my reiterating it.

Mr. PERRY: Of course.

By Mr. PERRY:

Q. When did your position, as her adviser, with regard to the proper course for her to pursue, change in any regard? A. It never changed at all.

Q. You have spoken, in your cross-examination, and possibly in

your direct examination, of an interview you had after that
576 with Mr. Cahill. When did that occur? A. That occurred on the 5th day of October.

Q. Then, too, there is in evidence here correspondence between Messrs. Darlington and Tobriner and yourself, the date of which I can give in a moment, and in one of the letters in that correspondence you make a certain proposition of compromise to them. A. That was on the 30th of October.

Q. I now ask you, in view of these facts, to refresh your memory, and to state whether or not your opinion changed in any way during that time, as to what was the proper course for Mrs. Kennedy to pursue? A. No, my opinion did not change.

Q. Did your action change? A. My action did change.

Q. In consequence of what? A. In consequence of Mrs. Kennedy's great desire to get rid of litigation.

Q. Did you or not enter into that negotiation with Mr. Cahill, and did you or not write that letter to Messrs. Darlington and Tobriner, as counsel for the Kings, in consequence of Mrs. Kennedy's desire in that direction?

Mr. DARLINGTON: I specially object to the leading character of these questions.

A. Yes; both of those things entered into it, at Mrs. Kennedy's suggestion.

Q. Mr. Darlington has asked you why you did not give the Kings a chance in that direction. Will you state whether or not
577 these negotiations with Mr. Cahill and also this letter written to Messrs. Darlington and Tobriner, was a chance to the Kings in that direction? A. I should so regard it.

Q. After you had received the letter from Messrs. Darlington and Tobriner declining to accede to the terms of these letters of yours of October 30th, what was the next step you took as Mrs. Kennedy's adviser? A. I prepared a landlord and tenant complaint and left it with her to sign.

Mr. PERRY: I understand that complaint will be produced by these gentlemen. It was in point of fact signed by her.

Mr. TOBRINER: The original of that is in the office of the justice of the peace.

Mr. PERRY: We will have that here.

By Mr. PERRY:

Q. You say you prepared that? A. Yes, I prepared that.

Q. Do you recollect the date of it? A. It was filed on the 9th day of November.

Q. State whether or not, prior to that time, you had sent this notice to quit? A. I sent them a notice to quit on the 4th day of October.

Q. Was that signed by Mrs. Kennedy? A. Yes.

Q. Did or did not that complaint, which was filed on the 9th day of November, express the final action taken by Mrs. Kennedy
578 with respect to this matter? A. It did; yes.

Q. Your attention has been called by Mr. Darlington to an alleged agreement between Mr. Cohen and yourself, with respect to a new lease. —. ——.

Q. When you went to see him, soon after you learned that this certificate had been issued and had become irredeemable, I would like you to explain, in connection with your motives in this matter, why it was that you considered it necessary to see whether or not you could get a new tenant, before you advised Mrs. Kennedy definitely as to the line of conduct she ought to pursue? A. On the receipt of Mrs. Kennedy's letter of Sunday evening I considered that as authority to me to see if I could get another tenant, in case the lease was declared forfeited.

Q. Did you or not have any conversations with Mrs. Kennedy upon that subject, prior to the writing of that letter by her? A. I think I talked about that subject with her on the afternoon of the 26th of September. I may have mentioned the fact that the Kanns might rent the property; but I am by no means certain of it.

Q. State what idea was in your mind with respect to the prudent advice to be given Mrs. Kennedy, when you went to see whether or not you could get this new tenant.

Mr. DARLINGTON: I object to the witness stating what was in his mind.

Mr. PERRY: He has been asked about his objects and motives. Otherwise it would not be competent; but I submit that your
579 cross-examination has made it competent.

By Mr. PERRY:

Q. When you went to see Mr. Cohen you went to learn whether you could get this new tenant? A. I wanted to be certain, before I advised Mrs. Kennedy definitely to forfeit the lease, that she was in a position to get another tenant.

Q. You have stated, in answer to a question by Mr. Darlington, that Mr. Cohen said to you at that interview, that he did not want their willingness to take this new lease to be used as a club against the Kings. State more definitely what that language was, and in what regard he said he did not want it to be used as a club over the Kings or against the Kings? A. I think he meant that he wanted to get the lease.

Q. You do not understand my question. When Mr. Cohen told you that he did not want the readiness of the Kanns to take this new lease to be used as a club against the Kings by you, what more did he say in that connection, if anything? A. That he did not want it to be used as an inducement to forfeit the lease.

Q. You have stated somewhere, either in your answer, affidavit or testimony, that Mr. Cohen said he did not want it to be used against

the Kings to increase the rent to them. Does that refresh your recollection about it in any way? On page 71 of your affidavit you say: "Thereafter and later in said day the said Cohen informed this defendant that his clients would lease said premises on the
580 terms stated, provided they were given possession thereof, and their said offer was not used as a means to compel the complainant to pay a higher rent." Does that refresh your recollection about the matter.

Mr. DARLINGTON: I object. We not only have leading questions but we now have the witness further led by quotations from his affidavit. I submit that is not competent.

A. I remember that Mr. Cohen made that statement.

581 By Mr. PERRY:

Q. On page 22 of the printed record you will find your letter written October 14th, 1901 to J. J. Darlington and Leon Tobriner. I call your attention to this paragraph: "With the knowledge which I now have of the conduct of the lessee in this matter and the utter disregard shown of the interests of my client when the present situation could have been averted, I think it would be most unwise for my client to abdicate the protection of her own title in favor of a person who has proved so faithless to the important obligations contained in the lease." I want to know what you meant by that language.

Mr. DARLINGTON: I repeat my objection.

A. The proposition was made to Mrs. Kennedy to allow the complainant to use her name in order to set aside this tax title and I declined that on the ground that I then supposed that the taxes had not been paid and because I knew of this failure to redeem this tax title since July.

Q. Then what did you mean when, in answer to Mr. Darlington, you stated that the only thing you had in mind in this negotiation, and in favor of enforcing the forfeiture, was the fact that you could get a shorter term and a higher rent? A. My idea was to get rid of the present lease and then lease the property at more advantageous terms.

Q. Why did you determine to advise your client to get rid of the existing lease?

Mr. DARLINGTON: I submit that the witness ought not to answer that question with his letter of October 14th before him, as
582 he is now doing.

Mr. PERRY: I do not see why it is not permissible to have his attention called to the letter on one side as well as on the other.

A. Because, in the first place, the lease had been forfeited. One of the principal covenants in the lease had not been kept and I knew

that she was anxious to get rid of this lease on account of the length of the term it had to run.

Q. What was the situation presented to you when, on the 9th of October, 1901, you had the negotiations with Mr. Cahill on the one side representing the Kings and with Mr. Johnson and Mr. Cohen on the other side representing the Kanns. A. The situation then completely changed. I then saw that it was impossible to negotiate with Mr. Cahill and I think I so informed him.

Q. Why did you regard it as impossible to negotiate with Mr. Cahill? A. Because I knew that we could only do that by fighting for the existence of the property and I did not care to run that risk for this lease, which we were anxious to get rid of.

Q. Mr. Darlington has asked you what you meant by the language used in your answer, at page 69 of the printed record, to the effect that the tax sale was actual and the property was actually sold. What did you mean by that? A. There was an allegation made in the bill that it was a pretended sale, and it was in answer to that, particularly.

583 Q. How did you understand the averments made in this case that pressure was brought to bear upon Mrs. Kennedy and undue influence was brought to bear upon her. How did you understand that as charged in these proceedings?

Mr. DARLINGTON: I object to that question on the grounds heretofore stated.

A. I understood that she was forced to do something she did not want to do.

By Mr. PERRY:

Q. By whom? A. By the Kanns or their attorney.

Q. To your knowledge, did the Kanns ever come in contact with Mrs. Kennedy? A. No, sir; nobody saw Mrs. Kennedy, that I am aware of, except myself and Dr. Fry.

Q. For explicitness, I will ask you if Mr. Cohen or Mr. Wolf ever saw her? A. Not since the 25th day of September, 1901.

Q. What did you do in connection with this matter, with Mrs. Kennedy; what did you put before her? A. I put the whole situation before her.

Q. What do you mean by "the whole situation"? A. First the fact of the non-payment of taxes.

Q. I do not care for the details; but what were the two sides of the situation? A. Why, that she must either accept the proposition that was made to her by the Kings that she should fight the tax title and thus save for the Kings this lease, or that she should forfeit the lease and obtain for herself a new and more advantageous

584 lease, as well as a release from the adverse tax title.

Q. As her legal adviser, did you state these two alternatives? A. I did.

Q. Did you give her advice with respect thereto? A. I did.

Q. Was any other means used, in order to obtain her action, than those you have spoken of? A. None that I know of.

Q. When did she sign this notice to quit? A. The notice to quit was brought to me on the morning of the 9th of November, by Dr. Fry.

Q. By whom was it signed? A. By Mrs. Kennedy—the notice to quit was signed by Mrs. Kennedy in my presence.

Q. When? A. Either on the 3rd or 4th of October, 1901.

Q. When was the complaint signed? A. As I say, I think the complaint was brought to me by Dr. Fry on the morning of the 9th of November.

Q. Was that also signed by her? A. Yes; signed by her.

Re-cross examination.

By Mr. DARLINGTON:

Q. Between the giving of this notice to quit on the 3rd of October and the 9th of October, you, with the acquiescence of Mrs. Kennedy and largely at her instance, were considering the giving
585 of a new lease to the Kings? A. I broached the subject to her and talked it over with her. It was hardly a considering of the question.

Q. You say you were actually preparing a proposition? A. Yes; I talked the matter over with her and she thought—we discussed the proposition.

Q. She thought what? A. I say she discussed the proposition.

Q. You started to tell us what she thought? A. I was going to say that I proposed a lease to her, which she agreed to.

Q. What lease was that? A. I do not think it is necessary for me to state the terms of it.

Q. I think it is.

Mr. PERRY: I think you had better state the terms.

A. In the first place Mr. King was to redeem this tax title, and in consideration of the fact that it might be an expense to him I was going to propose that for one or two years the rent should be at the present rental and then for three years more it should be at $300 a month.

Q. Mrs. Kennedy was willing to approve of that? A. I think Mrs. Kennedy said those are very liberal terms.

Q. She approved of that? A. That is what she said.

Q. What led her to change her mind about that? A. The statement made by Mr. Johnson, on the 9th day of October.
586 Q. So that her change of purpose was not voluntary, but was caused by what you call Mr. Johnson's threats; was it not?

Mr. PERRY: I object to that question. You need not answer it in that shape.

Mr. DARLINGTON: I submit that Mr. Webb should answer it in

that shape. After his cross examination I think I have the right to have the question answered as it is put.

Mr. PERRY: You can answer it in your own way.

A. It was caused by the entire change in the situation and by the necessity of choosing one of two courses, either to fight the tax title for the benefit of Mrs. King and to continue this lease, which she was anxious to get rid of, or to turn around and forfeit the lease and enforce the forfeiture in order to obtain a surrender of this adverse tax title and a better lease.

Q. This entire change of situation was nothing more or less than what you call Mr. Johnson's threat; was it? A. You can put it in that way if you want to.

Q. Is not that substantially right? A. Well, it was in a measure a threat.

Q. What else was there besides this threat? A. It was an offer of a better lease. If Mr. Johnson had offered me a lease which was less advantageous than the one I had, I most likely would not have changed.

Q. Notwithstanding the threat? A. I might have fought the tax title, but what I might have done is not here for consideration.

587 Q. When you say the Kanns never came in contact with Mrs. Kennedy you mean nothing more than that they did not come in personal contact with her? A. Yes.

Q. These communications from Mr. Johnson and Mr. Cohen were submitted as counsel for the Kanns and, in turn, by you submitted to Mrs. Kennedy? A. These statements were laid before Mrs. Kennedy.

Q. As coming from Mr. Johnson, who was counsel for the Kanns? A. As coming from the Kanns; yes, sir.

Q. Are you quite sure that Mr. Cohen stated to you, on the 30th of September, that he did not want the offer of the Kanns to be used as an inducement to forfeit the lease? A. Or words to that effect.

Q. That was just what you were using the Kann offer for, in order to get a lease at a higher rental and to induce Mrs. Kennedy to forfeit the lease? A. No; I was not using it for that. I was not inducing Mrs. Kennedy to do anything. I was laying the situation before her.

Q. Have you not said that your object in trying to get a tenant at a higher rent was to determine whether it would be well to forfeit the lease or not? A. I wanted to be certain I could get a tenant.

Q. Mr. Cohen told you not to use that offer to induce the forfeiture of the lease and yet you used it for that purpose? A. I regarded the main reason for the forfeiture of the lease to be the non-payment of the taxes.

588 Q. You have told us several times that was the legal reason and that your real reason was to get a shorter term and a higher rent? A. That was one of the reasons.

Q. Have you not said that those were the real actual reasons? A. Yes; that was the real reason.

Q. You would have been perfectly willing to give the Kings a new lease if they would have taken it at a higher rental and for a shorter term? A. And had redeemed the tax title. I have stated I had that proposition in mind.

Q. Then all of this talk in your letter of October 14th, referring to Mrs. King as the person who was so faithless to the important obligations contained in the lease, was in relation to legal reasons, was it? A. Yes.

Q. You have said that your answer was originally drafted in your own handwriting, part, if not all of it. I want to ask you to look at page 75 of the printed record, paragraph 3, at the beginning of the second sentence, as follows: "This defendant is not able to state whether the amount of said estate will largely exceed in value the amount of said legacy." Was that put in by yourself as part of your original draft? A. I think so; I knew that.

589 Q. The amount of these legacies was $40,000? A. Yes.

Q. Are you correct in saying that your proposition of October 30th was to give the Kings a chance? A. That was virtually accepting the proposition that had been made to Mrs. Kennedy by the Kings.

Q. But that was not made until after litigation was in prospect and the object of that proposition was not to give the Kings a chance to take a new lease at a higher rent. A. The object of the proposition, I think, is plain enough on its face.

Q. You said, in reply to one of Mr. Perry's questions that you made that propositoon of October 30th, in order to give the Kings a chance. I am now asking you if that was the real object of it? A. That, in connection with my interview with Mr. Cahill.

Q. I am now speaking only of the proposition of compromise of October 30th. A. The two were not separated; they were made at the same time.

Q. Let me call your attention to the fact that, according to your statement, the Cahill proposition was abandoned after October 9th and this letter was written October 30th. Those two things were not connected, were they? A. No, sir: not at all.

Q. Then let me ask you again whether the object of this proposition of October 30th was really to give the Kings a chance?

590 A. To give them a chance to do what they proposed to do, that is to defeat this tax title and save Mrs. Kennedy harmless.

Q. Having stated under oath in your answer that you are unable to state whether this property was worth more than the legacies, namely $40,000, what have you to say of this proposition of compromise, at page 79 of the record, which provides that if they should fail in their efforts to defeat the tax title they should pay Mrs. Kennedy the sum of $70,000 for the property? A. I do not say that.

I said they were to give Mrs. Kennedy a bond in the penalty of $70,000.

Q. Let me read you from the conclusion of the first paragraph on page 79: "In the event of said proceedings resulting in the establishment of a title of said Cohen under said deed or the tax sale upon which it is based the said sum of $70,000 shall forthwith become payable without abatement as liquidated damages to the said Mrs. Kennedy, or those claiming under her. A. What do you want me to say?

Q. I want to ask you how you reconcile that with your statement that you wanted to give them a chance, when that chance was to make them pay $70,000 for the property which, in your answer, you swear was not worth much more than $40,000. A. I did not swear it was not worth much more than $40,000.

Q. In your answer, in the third paragraph, you have stated that you are not able to state whether the amount of said estate
591 will largely exceed the legacies. You have also stated that was put in by yourself and was true and that these legacies were about $40,000? A. I think they were about $40,000.

Re-cross examination.

By Mr. BRADLEY:

Q. You stated that on the 26th of September, 1901, the day after Mr. Knight informed you of this tax sale, you went to the tax office and there ascertained that this tax certificate was irredeemable? A. Yes.

Q. What was it that convinced you of that fact? A. I found that it had been sold more than two years prior to that time—I mean that it had been sold in April '99 and that more than two years had expired since that time.

Q. Did you inform Mrs. Kennedy of your opinion that this tax title was irredeemable? A. Yes, I think so.

Q. Did you advise her that there was a possibility of purchasing this tax title from the holder of it? A. Not at that time; no.

Q. Why not? A. I asked her whether she wanted to declare the lease forfeited or whether she would contest the validity of this tax title, and employ Mr. Knight to contest it.

Q. And you advised her that, in your opinion, the forfeiture of the lease was more important than the redemption of this tax cer-
tificate? A. I did not advise her anything of the kind. My
592 idea was to separate the two and take up one at a time.

Q. Did you ever advise Mrs. Kennedy of the propriety of redeeming this tax title? A. I did not.

Q. If you believed that this tax title would be irredeemable and was irredeemable, why did you not advise Mrs. Kennedy as to the propriety of attempting to purchase it? A. I did not understand your question.

Q. If you believed that this tax title would be irredeemable or

was irredeemable, why did you not advise Mrs. Kennedy as to the propriety of attempting to purchase it? A. I explained that to you once before, that I wanted to separate these two actions entirely—the forfeiture of the lease and the probable contest or future contest of the tax title.

Q. And that is the only explanation that you can give for not advising Mrs. Kennedy of the propriety of attempting to purchase the tax title? A. I never advised her because I did not contemplate doing that.

Q. That was not my question. The only explanation you can give for not advising Mrs. Kennedy of the propriety of attempting to purchase that tax title is the one you have given? A. I intended to take up the question of purchasing or contesting the tax title thereafter.

593 Q. I do not think that quite answers my question. A. Then I cannot answer it, because I do not understand the question. I have explained to you why I did not do that at that time.

Q. Did you ever, at any time, advise Mrs. Kennedy of the propriety of attempting to purchase this tax title? A. I did not.

Q. Why not? A. I have explained to you two or three times that I was taking up the questions one at a time. I took up the question whether the lease should be forfeited and then I intended to deal with the tax title afterwards. I should have advised Mrs. Kennedy, when the time came, to contest this tax title, or purchase it, which ever I thought was best; but the occasion did not arise.

Q. You stated, I believe, that you had made an examination of the law relative to the tax title? A. I did not.

Q. You were Mrs. Kennedy's legal adviser at that time? A. Yes.

By Mr. PERRY:

Q. Will you state what the compromise with the Kanns involved in respect of the tax title? A. The compromise made with the Kanns involved the surrender of the tax title.

HENRY RANDALL WEBB.

Subscribed and sworn to before me this 7th day of April, 1903.

WM. HERBERT SMITH,
Examiner in Chancery.

The further taking of these depositions was thereupon adjourned until Thursday, November 13th, 1903, at 8 o'clock p. m., at the office of Wolf & Cohen.

594 WASHINGTON, D. C., *November* 12, 1903—8 o'clock p. m.

Met pursuant to adjournment at the office of Wolf & Cohen, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendants, Messrs. Cohen and Kann, Mr. Johnson.

Present on behalf of the defendant W. Randall Webb, Mr. Perry.

Present on behalf of the defendant Dewey, Mr. Bradley.

MYER COHEN, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined

By Mr. JOHNSON:

Q. Mr. Cohen, I wish you would please state your age and business. A. I am 37 years old and am an attorney-at-law.

Q. You are a member of the bar of this District? A. I am and have been for the past sixteen years.

Q. You are the Myer Cohen named as a defendant in this bill? A. I am.

Q. Do you know the defendants Kann? A. I do.

Q. What is your business relation with them, if any? A. I have been their general counsel since about 1896.

595 Q. And continuously? A. And continuously since then.

Q. Did you have any acquaintance with the property that is the subject of this litigation? A. I had.

Q. Where is the property which the Kanns occupy? What is its physical situation? A. Around and about the premises in litigation, on both sides, east and west, and also to the north, which is the rear.

Q. Did they occupy property so situated prior to September, 1901? A. They did.

Q. Is the property occupied by the Kanns on the east and west of Mrs. Kennedy's property connected in any way? A. It is connected in the rear of the property in litigation.

Q. Was it in that situation in September of 1901? A. It was.

Q. What character of business are the Kanns in? A. They conduct a general department store.

Q. Will you state whether or not that is a large or a small business? A. It is a large business, I believe.

Q. How much area did they occupy in September, 1901, approximately? A. They had a frontage on Market space to the east of No. 715, of about 100 feet and to the west of about 60 feet, running through to D street and occupying on D street the space be-

596 tween the alley and 8th street, as well as all the property fronting on 8th street, between Market space and D street.

Q. When did you first learn that the property occupied by the Kings had been sold for taxes? A. On the 19th or 20th of September Mr. Louis Kann informed me that a Mr. Knight had called at

their place of business on the morning of that day and told them that some of their property which they occupied had been sold for taxes.

Q. Some of whose property? A. Of the Kanns, or that which they occupied, and that he had informed Knight, after going to the front on Market space and examining the property in question, that they, the Kanns, did not occupy that property, it being 715 Market space and that they had nothing to do with it, but that it was owned by Mrs. Kennedy, whose attorney was Mr. Henry Randall Webb. This was the first knowledge that I had of the matter.

Q. What, if any, further information about the tax sale did Mr. Kann communicate to you? A. Nothing whatever.

Q. What, if anything, did you do or say on the subject at that time? A. I made no comment whatsoever, nor did I do anything concerning it.

Q. Will you tell us where this conversation occurred? A. My impression is that it occurred at Sautter's café on 9th street, where we were meeting to take lunch.

Q. About what hour in the day? A. About 12 o'clock.

597 Q. Did you know Mr. Knight? A. I did not.

Q. State whether or not up to that time you had ever seen him? A. I had not.

Q. State whether or not up to that time you had any knowledge of his profession, business or occupation? A. None whatever.

Q. State whether or not Mr. Kann gave you Mr. Knight's full name at that time? A. I am quite sure he did not.

Q. I wish you would state the first time when anybody else ever spoke to you on the subject of that tax sale. A. On the morning of the 30th day of September, 1901, when Mr. Webb came into my office.

Q. Do you refer to Mr. Henry Randall Webb, a defendant in this suit? A. I do.

Q. Did he mention the subject to you? A. He did.

Q. Between the 19th or 20th, whichever it was, and the morning of the 30th, when Mr. Webb spoke to you, state whether or not you had spoken to anybody on the subject of that tax sale or that property? A. So far as I know I had never mentioned it to anybody.

Q. State what, if anything, you had done during those ten days to inform yourself about the fact as to whether there had been

598 a sale or not? A. I did nothing whatever.

Q. What further or other information had you between the 19th or 20th of September and the 30th of September with reference to the tax sale than that communicated to you by Mr. Kann on the 19th or 20th? A. I had no other information whatsoever.

Q. I wish you would state as nearly as you can recall all that took place in the interview between you and Mr. Webb on the morning of the 30th. A. When Mr. Webb came into my office he said to me "Cohen, some time ago one of the Kanns said something

about being willing to rent the property occupied by the Kings and pay $300 a month for it. Are they still willing to do so, do you know?" I replied that I couldn't tell, but I asked him for an explanation of his proposition and he said "Well,"——

Q. What is it you call a proposition? A. What I call the proposition is the question whether or not the Kanns would take the Kings' property and pay $300 a month for it.

Q. This inquiry of Mr. Webb? A. Yes, sir.

Q. You asked for an explanation? A. And he said "Well, the Kings have failed to pay their taxes and we are going to get rid of them as tenants." I then told him that I would consult with my clients, the Kanns, and find out how they felt about the matter and advise him later in the day.

Q. Will you tell me, if you are able to do so, about what
599 time in the day that inquiry of Mr. Webb took place? A. I should say about 11 o'clock in the morning.

Q. Did Mr. Webb remain at your office then? A. Mr. Webb then left my office.

Q. Did he give you any other information in reference to the failure to pay the taxes? A. He did not.

Q. State whether or not you sought any further information from him about it? A. I asked no further questions.

Q. Did you make any statement to him about it? A. I did not except this, that I knew from Mr. Louis Kann some days before that Knight had been to see Kann and told him about the failure to pay these taxes. I made that statement to Mr. Webb at the time that he mentioned the fact of the tax sale.

Q. After Mr. Webb left your office did you do anything in pursuance of your promise to communicate with your clients? A. I communicated with Mr. Sigmund Kann over the telephone. I told him——

Q. Is he also one of the defendants? A. Mr. Sigmund Kann is also one of the defendants and a partner of the firm of S. Kann Sons & Company.

Q. Go ahead. A. I told him of Mr. Webb's call upon me, repeated to him what had taken place, and asked him what reply I should make. He told me that they were willing to give $300 a month for the property and pay taxes provided that possession was given to them and that this offer should not be used as a
600 means of compelling King to pay a higher rent.

Q. Was there anything said by Mr. Webb or you in that first interview as to the length of the lease? A. I think not. In fact, I am quite sure nothing was said.

Q. Have you stated as nearly as you can the substance of your conversation with Mr. Kann? A. I believe I have, sir.

Q. I will ask you to state when you next saw Mr. Webb? A. About 1 o'clock that day.

Q. Where did you see him? A. I called at his office, to the best of my recollection.

Q. You called at Mr. Webb's office? A. Yes.

Q. I wish you would state, as nearly as you can, what took place there and, as nearly as you can, the order of the events. A. I told Mr. Webb, word for word, what Mr. Sigmund Kann had said to me over the telephone. He then informed me that the tax sale of which he had spoken in the morning had become irredeemable by lapse of time. I asked him who had purchased it and he told me this man Wiltsie of Rochester. I then said to him "Well, Webb, why don't you buy that tax certificate yourself?" "Oh," he said, "there is no necessity for that." Then I said "Well, I believe I will buy it." He said "Oh, no, don't do that. I wish you wouldn't complicate the matter." That was the substance of our second interview on that day.

601 Q. Did Mr. Webb say anything to you on that occasion as to the attitude of his client with respect to the tenants? A. He made the general remark that Mrs. Kennedy was going to put them out for failing to pay the taxes; that she had determined to forfeit the lease; that he had advised her to return the rent if tendered.

Q. After Mr. Webb told you not to buy the tax certificate did you tell him whether you would or not? A. I didn't make any reply, when he said to me "Don't do that," or "Don't add that complication" or words to that effect; for my own remark that I might buy it was made in a jocose way at the time.

Q. I will ask you to state whether or not you intended to buy it when you made that remark to him jocosely? A. I had no intention whatsoever of buying it.

Q. I wish you would state now whether, up to that time, any person whomsoever had suggested to you that you buy it? A. No, sir.

Q. State whether or not any person, at any time, advised or suggested that you buy it? A. No, sir.

Q. After this second interview with Mr. Webb at his office, where did you go? A. As well as I can now recall it, I went to see the Kanns. Whether I went directly from Mr. Webb's office or returned to my own office first or not, I am not sure; but I saw the Kanns later in the afternoon of that day after I had had my second conversation with Mr. Webb.

602 Q. At that time had you met or seen Mr. Knight? A. I had not, sir. I may say here that I had never seen Mr. Knight nor had any acquaintance with him or knowledge of him until, I think, about last January, when I met him in another business matter.

Q. January, 1903? A. January, 1903.

Q. When you saw the Kanns after leaving Mr. Webb, or whenever it was that day, I wish you would state as nearly as you can what took place between you? A. After I left Mr. Webb on that day at the second interview, I began to revolve in my mind the advisability of actually buying this tax certificate and holding it for the Kanns; and when I saw them in the afternoon of that day I related to them what had occurred, gave them the details of both of

my interviews with Mr. Webb, simply repeating what I had told Mr. Sigmund Kann over the telephone of the first interview and giving them all the details of my second interview with Mr. Webb. At that time I told them I thought it might be a very good thing for them to have that tax certificate and that the more I revolved it in my mind the more certain I felt that it would be a good thing for them to own. They asked me what use I expected to make of it and what benefit it would be, but I had no clear idea on the subject myself and could only tell them that I had the feeling that it would be an excellent thing for them to own, in view of the situation as it stood. I told them, of course, that they would have to pay money for this tax certificate and I could not tell them how much and that made them somewhat more doubtful as to——

603 Q. Let me interrupt you. Will you state whether or not at that time you knew the amount of the tax and the amount of the sale? A. I did not and for that reason it was impossible for me to even approximate any amount of money that would be needed; but after discussing the matter in a general way with them and without coming to any definite conclusion, as to whether I would buy this tax certificate or not, they finally said they would leave it to me and stand back of me in whatever I might do, realizing that——

Mr. DARLINGTON: I object to the witness stating what they realized.

The WITNESS: All right; leave out that word "realizing."

By Mr. JOHNSON:

Q. Did anything further take place at that interview that you can recall? A. I think not.

Q. About what time of day was this? A. My impression is it was between 3 and 4 o'clock.

Q. Where did you go after that? A. I returned to my own office.

Q. What time did you leave your office? A. About a little after 5 o'clock.

Q. Between the time of your leaving Kanns and the time of your leaving your office, did you see Mr. Webb? A. I did not.

604 Q. State whether or not you held any communication with him in any way? A. I did not.

Q. State whether or not you held any communication with either of the Kanns between that time and the time of your leaving your office? A. I did not.

Q. During that time did you obtain any information in regard to the tax sale? A. No, sir.

Q. Now tell us what it was you next did, having relation to this matter? A. I made up my mind definitely that I would buy that tax certificate, and in order to obtain information as to the lot and square number, etc., I telephoned to the District Title & Insurance Company.

Q. State where that office is located? A. On 13th street near the corner of F. I asked Mr. Newton, who answered the 'phone, whether he would, although it was past their closing hour, as I knew, remain in the office, since he told me he was there alone, and let me examine some records in his vault.

Q. Let me ask you, please, to state here Mr. Newton's full name and business? A. Mr. Watson J. Newton, president of the District Title Insurance Company.

Q. Then what happened? A. He replied that he would do so, and I went to his office. I should state that Mr. Adolph
605 Wolf, my partner, was in the office with me at the time and went with me to Mr. Newton's as well. In fact, it may be he telephoned to Newton. I am not sure about that, but I think I did.

Q. You went to the office. Did you get in? A. We went to the office of the District Title Insurance Company. Mr. Newton was there and I told him I wanted to examine the record, if he had it, of the tax sales of April, 1899; and if my recollection serves me correctly, he got down the book and I looked it up and found that lot A, square 432, had been sold to C. H. Wiltsie. I don't believe the book showed the amount of the sale.

Q. You speak of a record. Was this a public record? A. I am inclined to think this was a record of the District Title Insurance Company.

Q. You mean one of the company's records? A. Yes; one of the company's records.

Mr. DARLINGTON: I object to this testimony and move to strike it out as to the contents of the record, on the ground that the contents of the record cannot be proved by parole; and I call for its production if it is material or relied upon for any purpose.

By Mr. JOHNSON:

Q. After Mr. Newton exhibited this record to you, did you do anything further? A. I had a talk with Mr. Newton about the matter of tax titles and asked him his opinion of them.

Mr. DARLINGTON: I object to any conversation between the witness and Mr. Newton about tax titles.

606 Q. Did you ask him anything about this sale? A. I think I did, sir.

Q. State what he told you.

Mr. DARLINGTON: The same objection.

A. He told me that under the law under which these tax sales were held he was inclined to think that if one could get peaceable possession of the property to which one had a tax title, that title would be held against the world.

Q. Did anything further occur there? A. I asked him to send me a bill for services rendered, and then I left.

Q. Did he ever send you that bill? A. He did.

Q. State whether or not it was paid.

Mr. DARLINGTON: I object to the question as being incompetent and immaterial to any issue in this case.

A. It was paid.

Q. I believe you have stated Mr. Newton was president of that company. Do you know whether or not he is a lawyer? A. He is a lawyer and one who, I believe, has made a specialty of real estate law for some years.

Mr. DARLINGTON: I object to the answer and move to strike it out on the ground that the opinion of this witness as to what Mr. Newton has made a specialty of is not evidence, even if material.

By Mr. JOHNSON:

Q. Are you able to tell us about what time of the day it was when you left Mr. Newton's office? A. I should say about 5:30; possibly a little later.

607 Q. Will you tell me, then, where you next went? A. I then walked up to Mr. Webb's residence.

Q. Did you go alone? A. Mr. Adolph Wolf was with me.

Q. Where was Mr. Webb's residence at that time? A. I think it was on 19th street just below Pennsylvania avenue, northwest.

Q. Do you remember what time you got there? A. As I stepped to Mr. Webb's doorstep and rang the bell I heard some church bell or clock striking 6. It was exactly 6 o'clock.

Q. You stated you rang the bell. State who, if anybody, responded to your ring? A. No one responded and at the end of a minute or two I rang again.

Q. What happened then? A. Within half a minute after the second ring I turned around and saw Mr. Webb coming towards his house.

Q. Did you meet? A. We met on his doorstep.

Q. State whether or not you entered his house. A. I did not.

Q. I wish you would state now, as nearly as you can, what occurred between you and Mr. Webb. A. I opened the conversation by saying to Mr. Webb "Mr. Webb, I am going to Rochester to-night to buy that tax certificate, and you and I must deal at arms' length. I thought it proper to come and tell you of this because of our talk this afternoon."

Q. Did Mr. Webb make any response? A. He said "Oh,
608 Cohen, I wish you wouldn't do that. I don't know about that;" and I replied, in a very positive way, "Well, I do." He then continued to urge me not to add that complication to the matter and said "You know I mentioned the fact of this tax title to you myself." I then reminded him, as I had informed him that morning, that I had first heard it through Mr. Kann, who had been told of it by Mr. Knight, who in turn had informed Mr. Webb.

Q. Can you recall any further conversation between you and Mr.

Webb, any remark that you made or that he made? A. I think that was about all that took place.

Q. How long, as nearly as you can recall, did this interview last? A. I should say not over ten minutes, if that long.

Q. I will ask you to state why it was that you went to Mr. Webb and gave him that information. A. Because when I left him in the afternoon and we had discussed the subject of the tax title in the manner I have related, I had possibly, by my silence, led him to suppose that I agreed with his request that I should not buy the tax certificate, and I wished to relieve myself of all question of unfairness in dealing with him; and I did not wish to be accused of doing anything that was tricky.

Q. State whether or not prior to that interview at his door you had in any way informed him of your change of purpose with reference to the purchase of the tax certificate? A. I had not.

Q. Will you state, Mr. Cohen, where you went after leaving Mr. Webb? A. I went directly to my own home, 1711 S street, northwest. I walked there.

Q. At that time state whether or not you knew Mr. Wiltsie? A. I did not.

Q. State whether or not you had had any business with him? A. I never had.

Q. State whether or not up to that time you had ever communicated with him in any way or he had communicated with you? A. No, sir.

Q. I wish you would state whether or not at that time you knew where he lived or his place of business? A. My recollection is that I knew that he lived in Rochester from having read in the papers, some long time before, of the fact of his making purchases at tax sales; but I did not know where he lived in Rochester.

Q. I think you have not stated whether or not you knew his office address? A. That is what I mean to say when I say *I say* I did not know where he lived in Rochester. I did not know his office address.

Q. State as nearly as you can the time that you reached home? A. It was about half-past 6.

Q. Had you dined? A. I had not.

Q. Did you take your dinner at home? A. Not immediately. I first—shall I state what I did?

Q. Yes, state what you did. A. I first communicated with Mr. Sigmund Kann over the long distance telephone from my house and informed him that I had determined to go to Rochester myself, and that I should draw upon his brother here—that is, the one that lives in Washington,—for such funds as I considered necessary.

Q. Will you please state the name of that brother? A. Mr. Simon Kann.

Q. Is he a member of the firm? A. He is not a member of the firm.

Q. Is he a party to this cause? A. He is not a party to this cause.

Q. What time was that that you had that telephone communication? A. It was about quarter of 7.

Q. Have you any record of that? A. I have.

Q. What is the form of it? A. A receipt from the telephone company.

Q. For what? A. For the message that I paid for on that occasion.

Q. Will you please produce that receipt?

(Witness produces a paper.)

Q. Is this the bill? A. This is the bill.

611 Q. I notice in lead pencil on this bill it is marked "Pd. Oct. 22—'01." Whose writing is that? A. That is my pencil memorandum.

Q. There is another memorandum here in ink "Oct. 22, 1901, Chesapeake & Poto. Tel. Co." Whose writing is that? A. That is the handwriting of my bookkeeper, who filed the receipt away.

Mr. DARLINGTON: The only objection I have to this paper is its utter immateriality.

Mr. JOHNSON: I will risk that.

(The above paper is filed herewith, marked "Exhibit Cohen No. 1.")

By Mr. JOHNSON:

Q. I will ask you to state whether or not Mr. Sigmund Kann assented to your proposition? A. He did.

Q. Or what is better, please state what he said. A. He repeated what had been said that afternoon, that they would stand back of me in whatever my judgment thought necessary in the case.

Q. Had you ascertained at that time the railroad methods of getting to Rochester? A. I knew that there were trains leaving Washington at night, one at, I think, 7:10, and the other, about 10:40, which went to Buffalo and stopped at Rochester on the way, by the Pennsylvania railroad.

Q. Did you take the 7:10 train? A. No, sir; that was impossible.

Q. Did you take the 10:40 train? A. I did not.

612 Q. Why? A. Because I learned that by the 10:40 train, carrying a sleeping car, one had to leave the car at Harrisburg and get into a day coach and sit up the balance of the way to Rochester, which I did not relish very much; so I abandoned the idea of going on that train.

Q. Did you go at all that night? A. Yes, sir; I decided to go and did go on the midnight train, arriving in New York the next morning about 7:30.

Q. You mean New York city? A. New York city, about 7:30. I

crossed through the town and went to the New York Central station at 42nd street and took the Empire State express, leaving at 8.30 o'clock on the morning of October 1st, and arrived at Rochester that afternoon at about 20 minutes past 3.

Q. Before leaving Washington, and after this telephonic communication with Mr. Kann, in Baltimore, what arrangements did you make about money? A. I telephoned to Mr. Simon Kann and told him I would want some cash, as I was going out of town to attend to some business for his brothers. He asked me how much and at a venture I replied "You had better bring me $500," to which he replied "Very well" and sent me up the money by one of his night watchmen, to my house, about half past 8 or 9 o'clock that evening.

Q. Did you communicate with any other person that evening before leaving Washington? A. I did.

613 Q. With whom? A. Mr. John Ridout.

Q. Who is he? A. A member of the bar of the District of Columbia.

Q. Where and how did you communicate with him? A. I called him up on the telephone from my residence.

Q. Where was he? A. I called him up at his residence on N street and asked him for some information about Wiltsie.

Q. I will ask you to state just what took place between you and Mr. Ridout, as nearly as you can state it. A. To the best of my recollection, I asked him if he knew Wiltsie. He said yes, he had had some transactions with him. I said "Where is his office" and he replied "In the Powers block." I said "Is that the only address you can give me in Rochester?" and I think he said "Yes." I then said "I expect to go to see him on some business and I would like to know what sort of a man he is."

Mr. DARLINGTON: I object to this conversation between the witness and Mr. Ridout as being incompetent and immaterial.

Mr. JOHNSON: Let it all go in, subject to your objection.

Mr. DARLINGTON: Very well.

A. He replied "That depends upon what the nature of your business is." I said "I want to see him in regard to something about an irredeemable tax certificate." He replied "Well, you will find he is something of a gouger." That was the substance of the interview, as I recall it now.

614 Q. Did you communicate with any one else between then and your actually leaving Washington with reference to this matter? A. No, sir.

Q. What, if any, communication did you have with Mr. Webb? A. Absolutely none.

Q. When you got to New York city what, if any, communication did you have with anybody on the subject from that point? A. I had no communication whatsoever with any person at that time.

Q. I omitted to ask you whether or not you went to Rochester

alone or in the companionship of any one? A. I think I went alone.

Q. Have you any doubt about it? A. None whatever.

Q. Did you go alone from New York city to Rochester? A. Yes, sir.

Q. After you reached Rochester where did you go? A. I went straight to the Powers block and in the corner of that building is a hotel which, I think, is known as the Powers hotel. My recollection is that I left my bag in the office, registered my name on the book and asked whether the Powers building was close there, was told that it was at the next corner, and went at once to Mr. Wiltsie's office.

Q. Now, I wish you would state, as nearly as you can recall, who you saw there and what took place. A. I asked if Mr. Wiltsie was in his office and was told yes. I sent in my card and was
615 ushered into his room. I told him that I came for the purpose of buying from him a tax certificate of property in Washington known as lot A in square 432. He sent for the papers. He began to look them over and asked me whether I represented the owner of the property. I said No. He asked me whether I represented the tenant. I said No. He said "Do you represent the mortgagee?" I said No. Then he asked me who I did represent and I declined to give him the information. He looked up then and said "Oh, well, I don't care a damn who you do represent. This certificate has been in Washington awaiting redemption at the hands of a man who has not taken it up and he has had ample opportunity to do it. What will you give for it?" I told him I could not make him an offer unless I had some idea as to the amount that he asked. He then said "I have been asking about $300 for this certificate." I said "Well, what do you want for it." He said "Make me an offer." He leaned back in his chair and I concluded to make him an offer that would bring the sale at once. So I said "I will give you $500 for it." He said "I will take it." I got up and started to put my hand in my pocket. He said "Hold on; that certificate is in Washington." I said "The devil it is." He said "Yes; it is in the bank awaiting redemption." I said "Well, maybe it has been redeemed; maybe you can't sell it to me at all." He said "Possibly." I said "Why not telephone to the bank and see whether it has been redeemed or not? If it has not been, direct them to send it back here, and I will pay the expense of the telephone message." He said "Th-t is a good idea." He stepped to the telephone and asked the central office to give him the Central national bank in Wash-
616 ington. He got them within a very short space of time and asked the man at the other end whether or not the tax certificate which had been sent to Washington to be redeemed to the order of Mr. King was still held by them. Of course I couldn't hear the reply, but he followed that up by saying "Then send it back to Rochester to me immediately. Put it in the mail at once." He then turned around to me and said "The certificate is yours.

It will be here to-morrow." I said "Well suppose I pay you a deposit on account of it so as to make certain it is mine?" He said "No, that is not necessary; it will be here to-morrow." He turned around to his bookkeeper or managing clerk, Miss Watson, and said "Miss Watson, I won't be here to-morrow, when this certificate comes, but you deliver it to Mr. Cohen and he will pay you $500 in cash for it." That was the transaction.

Q. Do you know anything about any telegraphing? A. I then suggested to him that he should confirm the telephonic message by telegraphing and that I would also pay for that. As I recall it, he dictated or wrote out the telegram and I took it down-stairs and sent it myself, addressed to the Central national bank, confirming the request for the return of the certificate.

Q. When before that had you received any knowledge of the tax certificate being in this city? I mean before Mr. Wiltsie's communication? A. I never had any information or knowledge on the subject whatsoever.

Q. Did you remain any longer at Mr. Wiltsie's establish-
617 ment? A. I think not. I think I left at once with the telegram in my hand and sent it and went to the hotel.

Q. Then what did you do next with reference to this matter? A. I called at Mr. Wiltsie's office the next morning and no mail from Washington, of course, had come in. I called in again at his office about 11 or 12 o'clock and it had not yet been received in the mail. As I wished to get back to Washington at the earliest possible moment, I desired very much to take the Empire State express which left Rochester at 2:30, I think, arriving in New York, or due in New York, at 10 o'clock at night. The next mail came in from Washington at about 2 o'clock. So I arranged with Miss Watson to go over to the post office with me herself and have the mail bag opened and take from it the certificate for delivery to me. Before doing that I went into the trust company in the same building where Mr. Wiltsie has his office and deposited the $500 and drew a check against it to my own order which they certified, as I wished the transaction to be one of record with Mr. Wiltsie. I then went to the post office with Miss Watson, as I have stated. The mail bag was opened, the certificate was in an envelope from the Central national bank, addressed to Mr. Wiltsie, Miss Watson opened the envelope, took out the papers and unpinned from them the draft on King, which was annexed to it, I examined the tax certificate hurriedly, found that it was assigned in blank, gave her the check and made tracks for the train.

Q. Did you leave Rochester that day? A. I left Roches-
618 ter at that time, about 2:30 in the afternoon and returned to Washington the same way I left.

Q. What time did you get to Washington? A. By the morning train on Thursday, October 3, having left New York the previous night at midnight.

Q. State whether or not up to that time you had received any communication from Mr. Webb? A. I had not.

Q. State whether or not you communicated with him? A. I did not.

Q. Did you bring this certificate with you? A. I did.

Q. State what was done with it? A. The certificate was converted into a tax deed on Thursday, October 3. I had Mr. Simon Wolf take the certificate to the collector of taxes and have the deed made out and signed and delivered to us at once, so that I could have it recorded on that day. I was informed that it usually took a week or ten days to put it through, but I thought it advisable to have it done promptly.

Q. I want you to state whether or not between the 19th of September and the 3rd of October you had spoken to or seen Mrs. Kennedy, the defendant to the original bill here, and the testatrix of Mr. Webb? A. I had not.

Q. State whether or not you had seen any one representing her or Mr. Webb between the evening of the 30th of September and that date? A. No.

Q. State whether or not you had communicated with any
619 one representing her or him during those days? A. No, sir.

Q. When did you next see Mr. Webb? A. My recollection is that I next saw Mr. Webb on Tuesday, the 8th of October. I had seen Mr. Tobriner, however, in the meantime.

Q. Between your return on the 3rd, and the 8th of October, state whether or not you had communicated with Mr. Webb? A. I don't think I did.

Q. State whether or not he had communicated with you? A. I believe not.

Q. State whether or not you had any communication between the 3rd and the 8th with Mrs. Kennedy or any one representing her or Mr. Webb? A. No, sir.

Q. Please state, as nearly as you can recall, what took place when you saw Mr. Webb on the 8th? A. I think it was on that occasion that Mr. Webb was told by me that Mr. Tobriner had called to see me several days before with a view to making terms with me as to the acquisition of this tax certificate, or rather, of the tax deed, and it was then that Mr. Webb told me that he was considering making a new lease with Mrs. King of the property which she then occupied.

Q. Anything else that you can recall? A. He told me about Mr. Cahill having been to see him, and I reminded him of the fact that he had practically agreed as I understood it to lease the property to us on the 30th of September, at my second interview with
620 him. He then said that he did not so consider that he had agreed, and that he must consider his duty to his client under all the circumstances.

Q. Do you recall anything else that took place? A. At the

present moment, I do not, although it seems to me that something else did occur, but I don't at this second recall it.

Q. You say prior to seeing Mr. Webb on the 8th you had seen Mr. Tobriner. Do you refer to Mr. Leon Tobriner, of counsel in this case? A. Yes, sir.

Q. I wish you would state when and where that was and what took place, as nearly as you can recall it. A. Mr. Tobriner called me up on the telephone and said he wanted to come over and see me on the morning of Friday, October 4, 1901. He came over to my office and saw me privately. The first thing he said was, as I recall it, "I have come over to see you about this tax deed business. Harry King is in my office now. He wanted to come over with me, but I was afraid I could not restrain him if he came. I thought he would do you personal violence." After replying to that, he then said to me "You don't deal in these tax titles usually. Why did you buy this certificate?" I replied that I had, as he knew, for some years, been trying to secure the property of the Kings for the Kanns by every means in my power, and that I had bought this certificate believing that it would assist me to that end. He then asked me if I would sell it and I said "I might. I would certainly consider any offer you make" He then asked me how
621 much I had paid for it and I declined to give him this information, telling him that he could obtain it, probably, from Mr. Wiltsie, and that it would give me time to think about the matter myself. He said "Well, I can't make you an offer if you don't give me an idea how much you paid for it." I repeated what I had already said, stating to him at the same time that it would give me an opportunity also to consult counsel, which I thought I would do later. He then made some remark about having gone about this thing in the wrong way; and of course we disagreed about that. He finally left my office and almost the last thing that was said by me to him was that he should submit me an offer and that I would certainly consider it.

Q. Do you recall anything else that took place at the interview? A. I think I went over the fact with Mr. Tobriner at the time that I had offered Mr. King a large amount of money for the lease in previous years, as he knew; but there was no further conversation on that point at that time.

Q. Did you see him again between then and the 8th? A. Mr. Tobriner?

Q. Yes. A. No, sir.

Q. After the close of your interview with Mr. Webb on the 8th, what did you do? A. As I recall it, I went to see Mr. Darlington on that day and told him that I wished to consult him in a matter involving the interests of the Kanns, as I had in the previous
622 July also consulted with him in their interests; that on this occasion the matter that I had to present to him involved the Kings. As soon as I mentioned this name, Mr. Darlington held up

his hands and said "I can't talk with you about that as I represent the Kings."

Q. Well, what happened after that, as far as you were concerned? A. The next day I consulted Mr. William G. Johnson and laid the case before him.

Q. When was that? A. On the morning of the 9th day of October.

Q. Do you recall how long that conference lasted? A. About two hours or two hours and a half, I should say.

Q. Did you see Mr. Johnson with any one else on that day? A. You mean when I first saw you?

Q. No. A. Oh yes; after our first conference on the morning of that day my recollection is that the Messrs. Kann came to your office at my request and we went over this situation as it then existed. As a result of that conference you were authorized by them to make an offer of compromise to Mr. Webb.

Q. Did you go to Mr. Webb's office again after the 8th? A. On the afternoon of the 9th of October I went there with you, sir.

Q. I will ask you to state what took place on that occa-
623 sion? A. You told Mr. Webb——

Q. Excuse me. I am sure these gentlemen will not object to my requesting you to use the name, instead of the word "you."

Mr. DARLINGTON: Not at all.

A. Mr. Johnson told Mr. Webb in my presence, on the 9th of October, that the Kanns were the owners of this tax title and that he came to Mr. Webb with a proposition of compromise to the effect that if Mrs. Kennedy would deliver possession of her property on Market space to the Kanns, under a long lease and for $300 per month rent, and the payment of taxes, the Kanns would release the tax title to Mrs. Kennedy, but if she rejected this proposition of compromise and litigation ensued, the Kanns would defend their tax title and, if necessary, enforce the same.

Q. Can you recall anything further that was said to Mr. Webb? A. Mr. Johnson said that the proposition was of such a nature that no one, in his judgment, could afford to refuse it, since in his, Mr. Johnson's, opinion, the tax title was a valid one.

Mr. DARLINGTON: I move to strike out Mr. Johnson's opinion as relating to this tax title.

The WITNESS: I am making a statement of what Mr. Johnson said to Mr. Webb.

Mr. DARLINGTON: I object to it, in the absence of the parties. It is not competent.

By Mr. JOHNSON:

Q. Do you remember anything else? A. I think Mr.
624 Webb then said that put a different face on the situation and said he would consult with Mrs. Kennedy and submit the offer of compromise made by Mr. Johnson.

Q. Did you observe how Mr. Webb was engaged when you entered his office that day? A. He was writing at his desk, and I believe he stated that he was then engaged in preparing the offer to lease to the Kings in the shape of a letter to Mr. Cahill.

Q. Did you observe anything that he did on that occasion? A. I think he tore up the letter and threw it in the waste basket.

Q. When and where did you next see Mr. Webb? A. I think I saw him the next day at Mr. Johnson's office.

Q. Will you state if you recall whether Mr. Webb said anything with reference to the proposition that had been submitted to him the previous day. A. He stated that Mrs. Kennedy had accepted Mr. Johnson's *office* of compromise.

Q. In the conversation which took place on the 9th with Mr. Webb in which the proposition for the compromise of the tax title was made, state whether or not you took a part in the statement of the proposition to Mr. Webb? A. I did not.

Q. About how long did that interview with Mr. Webb last, as nearly as you can recall? A. About fifteen minutes.

625 Q. I am referring to the first interview. A. On the 9th of October; yes.

Q. Mr. Cohen, Mr. Tobriner stated in his testimony, either direct or cross-examination, I do not recall which, that you had conferred with him about some possible compromise of this situation with the Kings and had made a suggestion as to their suffering a judgment by default in a landlord and tenant proceeding. Have you any recollection of that conversation? A. I have.

Q. I will ask you when that occurred? A. On the 29th of October, 1901.

Q. I wish you would state the circumstances under which it occurred. I observe that you referred to a paper before giving the date of that conversation. Will you please state what that paper is? A. That paper is a receipt in the name of Mr. Tobriner, as attorney for Philip King, in Mr. Tobriner's handwriting, and dated the 29th of October, 1901, for $400 and refers to another matter.

Mr. JOHNSON: I will show it to you gentlemen if you care to see it, and if you wish to offer it, you can.

Mr. DARLINGTON: I certainly do not. We have no objection to this paper going in, and prefer that it should go in, unless it is admitted it contains no reference to this conversation.

Mr. JOHNSON: No, there is no reference to this conversation.

By Mr. JOHNSON:

Q. Do you want to keep the paper for any reason, Mr.
626 Cohen? A. I might have to use it for some other reason.

Mr. JOHNSON: Then I suggest that it be copied into the record and be returned to Mr. Cohen.

The paper referred to is as follows:

Leon Tobriner, attorney-at-law, rooms 3, 4, 5, 6, 7, & 8, Equity bldg., 317–319 4½ street N. W. (near the city hall).

WASHINGTON, D. C., *October 29th*, 1901.

Received of Myer Cohen att'y the sum of four hundred dollars in payment of surrender of all interest in certificate share for one-fifteenth interest in syndicate holdings in square 773, originally issued to Henry King, Jr.

LEON TOBRINER.
Att'y Philip King.

By Mr. JOHNSON:

Q. I wish you would state the circumstances under which that statement was made to Mr. Tobriner and how it came to be made? A. I saw Mr. Tobriner on at least two occasions during the month of October after his call upon me on the 4th of October. The first interview I had with Mr. Tobriner (and both of them took place in his office) was after a meeting of the syndicate holders in square 773, a piece of real estate in the District of Columbia in which I represented the largest holders. We were purchasing outstanding interests in that square and I dealt with Mr. Tobriner as the representative of the King holdings. At the first interview I think I
627 opened the conversation by saying to him that I had not had any proposition from him for the purchase of the tax certificate and from that we passed on to a general discussion of the matter relating to the King property on Market space. He made a reference to the litigation with the Ohio national bank and said to me "How could we, if we wanted to sell you that lease, turn over the property to you and get any benefit from it ourselves?" The question was somewhat of a surprise to me and I did not answer it; but later in that day I consulted Mr. Johnson and put the same question to him that Mr. Tobriner had put to me; so that when I again saw Mr. Tobriner on the 29th of October and closed this matter up, of square 773 with him, I told him what I had been advised by Mr. Johnson could be done, which was that a landlord and tenant proceeding could be begun against Mrs. King, and that a sum of money agreed upon could be laid upon Mr. Tobriner's table and he could see that it went to the persons who were entitled to it.

Q. Anything else? A. I think not.

Q. Do you remember when that first interview with Mr. Tobriner was in which this matter of square 773 was being dealt with? A. About the 15th of October. I know it was after the meeting of the syndicate holders held in the office of Mr. Saks which was about the 11th or 12th of October. I also said to Mr. Tobriner at that first interview something about the way Mr. Harry King had treated me personally at this meeting.

628 Q. State whether or not you ever undertook to examine for yourself with a view of determining any question as to the validity or invalidity of this tax sale? A. I never did.

Q. State whether or not you consulted any one else with reference to it? A. Do you fix a time?
Q. At any time?

Mr. DARLINGTON: I object to the question as calling for incompetent testimony. What opinions Mr. Cohen may have gotten as to the tax title at any time would not be competent and certainly not since the beginning of this controversy.

A. Mr. W. J. Newton, on the 30th of September, and Mr. W. G. Johnson on the 9th of October, 1901.
Q. Did you consult any one else with respect to the question of its validity? A. No, sir.
Q. I will ask you to state what, if any, advice you were given on or after the 9th of October as to the validity of the tax title?

Mr. DARLINGTON: The objection is repeated.

A. By Mr. Johnson that it was a valid title—*prima facie* valid under the statute.
Q. State whether or not prior to the 9th of October, you received any advice, suggestion or intimation from any source that the tax sale was in any respect invalid? A. No, sir.

Mr. DARLINGTON: The same objection to the question and answer.

629 Q. Mr. Cohen, going back to the interview between you and the Kanns on the 30th of September in which you advised the purchase of the tax title, I would like you to state, as nearly as you can, what you told them of your purpose or object with reference to using it. A. I did not make any statement beyond what I have already answered, Mr. Johnson, as to my purpose or object in purchasing it, but I did have in my mind the fact that when acquired the tax certificate could be used, either against Mrs. Kennedy or against Mrs. King as the circumstances of the case might require and this came to me by reason of a previous transaction in which Mrs. Kennedy and the Kings were concerned and in which I was interested, that took place in the months of May and June, 1901, concerning the revocation of a certain alley agreement made between the owners of property fronting on Market space in 1871. At that time, that is, in May or June, 1901, after Mrs. Kennedy had signed a solemn agreement, the Kings compelled her to withdraw her signature or at least notified me that she had done so, in furtherance of their own designs; and with this information before me I felt it to be my duty to my client to be in a position to use this tax title as needs might be.
Q. I will ask you to state briefly what was the nature of that alley agreement, to what extent it affected the Kanns? A. The Kanns had purchased from Saks & Company the stock and leases in the building facing on Market space and were under the necessity, in

order to make use of all the property, to connect their various
630 buildings above the first floor. The alley agreement prevented building above the first floor.

Mr. DARLINGTON: I object to any statement of what the alley agreement prevented and call for the production of the paper.

Mr. PERRY: I think this whole matter is irrelevant, and I must object to it. It appears to reflect upon Mrs. Kennedy who is now dead and I think it my duty as counsel for the executor to object to it and move to strike it out as irrelevant and therefore incompetent.

Mr. JOHNSON: Well, I will not press it if it is objected to.

Mr. DARLINGTON: We have no objection in the world, so far as we are concerned. In fact, since it has been broached, we would rather it should be proceeded with.

Mr. PERRY: You did object, Mr. Darlington.

Mr. DARLINGTON: I only objected to his giving the oral statement of the contents of an agreement.

Mr JOHNSON: I did not call for the contents of the agreement. My question was——

Mr. DARLINGTON: But the witness was stating it. We are more than willing to meet the question of the controversy in May, 1901.

Mr. JOHNSON: I am satisfied. I have all I need about it.

Mr. PERRY: I do not think it proper that Mrs. Kennedy's executor should allow, without objection, matter of this sort, that would seem to reflect upon her memory to be gone into and I think it is absolutely irrelevant and therefore I insist upon the objection for that reason.

631 Cross examination.

By Mr. DARLINGTON:

Q. Mr. Cohen, have you any information of any efforts on the part of Mrs. King, through her counsel, to intervene between Mrs. Kennedy and her counsel and dissuade Mrs. Kennedy from acting under the advice of her counsel or in opposition to it?

Mr. JOHNSON: If I understand the question rightly, it seeks to inquire if the witness knows of any interference by counsel for the complainant between the counsel for Mrs. Kennedy and his client, and if that is the correct analysis of the question I object to it as not cross-examination and as entirely irrelevant to this case.

A. I presume you mean after the tax sale was acquired Mr. Darlington?

Q. I mean at any time? A. I don't know that I fully understand your question, but it seems to me that I heard of some interview between Dr. Fry and Mr. Darlington, which might relate to the question.

Q. Did you hear from Dr. Fry or from anybody else that Mr. Darlington had endeavored to dissuade Mrs. Kennedy from acting

under the advice of her counsel or in opposition to it? A. My impression is that Dr. Fry told me Mr. Darlington said the tax title was of no consequence and could be set aside.

Q. Anything more? A. That is all I recall.

632 Q. And was it on no more than that that you stated in your answer, under oath, in the 14th paragraph, that "the complainant, through counsel and through the said Dr. Fry, endeavored to dissuade Mrs. Kennedy from following the advice of her own counsel, the defendant Webb, and have her condone the forfeiture of the complainant and release her from the consequences thereof, in opposition to the advice of her own counsel?" A. Are you reading from the pleadings?

Q. Yes? A. This is in response to the 14th paragraph of the bill?

Q. It is on the bottom of page 47 and the top of page 48. A. Is that in answer to the 14th paragraph of the bill?

Q. Yes; you will see it there. A. Will you allow me to look at the 14th paragraph of the bill to which it is an answer?

Q. Certainly. A. That, I think, is on page 9, Mr. Darlington. After reading the paragraph of the bill and the answer to which it relates, I will say in answer to Mr. Darlington's question that this information also came to me from Mr. Webb before I made this answer.

Q. What information came from Mr. Webb? A. That "the complainant, through counsel and through the said Dr. Fry, en-

633 deavored to dissuade Mrs. Kennedy from following the advice of her own counsel, the defendant Webb, and have her condone the forfeiture of the complainant, and release her from the consequences thereof, in opposition to the advice of her own counsel."

Q. Was it Dr. Fry or Mr. Webb? A. I have stated that I had heard that Dr. Fry had said this. I did not say that Dr. Fry had told me that this had been done.

Q. Did you hear that Mr. Darlington had sought Dr. Fry, or that Dr. Fry had come to Mr. Darlington in this connection? A. I heard that Dr. Fry had called to see Mr. Johnson, and, not meeting him in his office, had accidentally met Mr. Darlington, his own counsel, and discussed the matter with him.

Q. And upon that basis you charged counsel with endeavoring to intervene between other counsel and their clients? A. As I have said before, upon the information given to me by Mr. Webb.

Mr. DARLINGTON: I would like to recall Mr. Webb at a later stage on this point.

Mr. PERRY: There will be no objection to that.

By Mr. DARLINGTON:

Q. Now, Mr. Cohen, in order to eliminate at the beginning any questions in which I have a personal concern, did I understand you

to testify tonight that I was associated in any manner with the Kanns in this controversy in 1901? A. No, sir; if so, you misunderstood me. What I said was that at the time litigation was threat-
634 ened in July, 1901, by the Kings against the Kanns, in the nature of an injunction suit, I consulted Mr. Darlington and *and* laid the proposition before him, and asked him to represent the matter in court if it came up, as I was expecting to leave town.

Q. What litigation was on between the Kings and the Kanns in May, 1901? A. July, 1901.

Q. In July, 1901? A. No litigation was on, but some had been threatened by the Kings.

Q. Is not this the fact, Mr. Cohen: That you called upon me at my office and simply asked my opinion upon a question, not in a business way at all, without any suggestion on either side of a retainer, and at the conclusion said that if there was litigation you wanted to retain me? A. Mr. Darlington, that is not correct, for I have a very clear recollection of mentioning the subject of a retainer to you and you waived it aside saying that if there was anything to be done in the matter it would be time enough to dispose of it then.

Q. Then there was no relation of attorney and client, so far as I am concerned, on that subject? A. None beyond what I have stated.

Q. Now, please tell us from whom litigation was threatened at that time? A. From the Kings.

Q. In July, 1901? A. In July, 1901.

635 Q. And what about? A. Because the Kanns were then, in pursuance of this alley agreement to which I have before referred, building across the property and in the rear of the premises occupied by the Kings. At that time—shall I go on, sir?

Q. If you wish. A. I wish to please you.

Q. State it as fully as you like. A. I don't want to be prolix, and if you have what you are looking for, please stop me.

Q. I am looking for the facts. If you have not stated all the facts, continue. A. I have given you the facts. This question, as I understood, Mr. Darlington, arose out of the question of your personal connection with the matter. If you wish me to go into what those facts were I will do so.

Q. I simply ask you what litigation was threatened, by whom, and over what? A. A suit——

Mr. PERRY: Mr. Perry objects to cumbering the record with this absolutely irrelevant matter, and moves to strike it out.

A. An injunction suit was threatened by the Kings against the Kanns to prevent them from carrying out their project of connecting their various buildings above the first floor.

Q. Which King threatened such a suit? A. I understood that Mr. Harry King did.

636 Q. From whom did you understand that? A. Mr. Sigmund Kann, who told me that Mr. Tobriner had informed him he had the papers ready for the suit.

Q. I observe, Mr. Cohen——

Mr. PERRY: Please understand, my motion to expunge relates to the whole of this irrelevant matter.

Mr. DARLINGTON: Oh, yes.

By Mr. DARLINGTON:

Q. I observe that the original lease between Mrs. Kennedy and Henry King, Junior, was witnessed by you and the acknowledgment taken before you. Do you recall the circumstance? A. I remember the fact, but I don't recall the circumstances.

Q. That lease was drawn by your firm, was it not? A. It was not, sir.

Q. By whom was it drawn? A. That I am unable to say. I have been informed that it was drawn, and I believe Mr. Henry Randall Webb testified it was drawn, by his brother.

Q. I will suspend further examination about that paper until we have the original. What were your relations to the Kings at that time? A. I knew them very well. They had done various kinds of business with me, and the firm with which I was connected.

Q. I observe that every extension of this lease was witnessed by some member of your firm. Did or did not those transactions take place through your office? A. I am unable to say. If the record speaks, I presume that is sufficient.

637 Q. Were or were not your firm counsel for the Kings at this period? A. I am quite sure we were not. Mr. Tobriner, I think, was always the counsel for Mr. King.

Mr. JOHNSON: May I ask if you are inquiring about 1890?

Mr. DARLINGTON: Yes; 1890 and 1892.

A. I will say that our relations with Mr. Henry King, Junior, were very close and very friendly. I believe I can tell you why.

Mr. PERRY: I object to why they were.

Mr. DARLINGTON: I have no objection to it.

Mr. PERRY: He is proceeding to say why they were friendly. Of course we do not want that.

By Mr. DARLINGTON:

Q. Who was your best man at your wedding, Mr. Cohen? A. I had no best man, Mr. Darlington. I was the best man.

Q. What part, if any, did Mr. Harry King take on that occasion, upon your invitation? A. I had been an usher at his brother's wedding, just before or about that time, and he was an usher at my wedding.

Q. Which one of Mr. Harry King's brothers' wedding was it at which you were an usher? A. Mr. Samuel King.

Q. Where did that occur? A. I say before, or about, that time.
Q. Where? A. Wait a moment. I am mistaken about that.
Q. I thought you were. A. I was mistaken about that.
638 I have reference to the wedding of a sister of Mr. Samuel King's wife, who was married to Mr. Noot.

Mr. PERRY: Mr. Perry objects to this line of examination as irrelevant, and moves to strike it out.

By Mr. DARLINGTON:

Q. How long had the Kanns' premises surrounded No. 715 Market space in the way you have described? A. The question as I recall it to which I responded was as to physical condition of the premises in 1901; and you are now asking me as to how long——
Q. How long that condition had existed. A. I am unable to say definitely at this moment.
Q. Approximately how long? A. In 1901 I should say that that condition of things had existed for three or four years.
Q. When did the Kanns open business in that square? A. In 1893.
Q. How long did the Kings occupy 715 Market space? A. If you can give me the date of the failure of Mr. Emil Stiebel——
Q. You are a lawyer, Mr. Cohen? Can you not answer this question? A. I will answer your question. I am trying to give you the exact date. If you can give me the date of the failure of Mr. Emil Stiebel, I can then give you that date. I cannot give it exactly. I should say it was somewhere around 1889 or 1891.
Q. The Kings then had occupied 715 Market space for
639 some years before the Kanns had opened business there at all? A. I think that is true, sir.
Q. Please repeat, as fully as you can, just what Louis Kann told you Knight had said to him about this tax sale? A. That a man named Knight had called on him and told him that some of his property, or the property which they occupied, had been sold for taxes, and that upon going outside of the place with Mr. Knight and Mr. Knight pointing out 715 as the premises which had been sold, Mr. Kann said: "We have nothing to do with that. That property is owned by Mrs. Kennedy, whose attorney is Mr. Henry Randall Webb."
Q. Did he explain why they went outside to examine the number? A. I think Mr. Knight told him that it was No. 715, and that Mr. Kann not being sure of his own numbers, went outside with him for that purpose.
Q. Is that all that he told you Knight had told him about the sale, the fact that the property had been sold for taxes? A. That is all, sir.
Q. That is all you knew until Mr. Webb took up this matter with you on September 30? A. Yes, sir.
Q. You did not know to whom the property had been sold for taxes? A. I did not.

Q. Nor when? A. Nor when.

640 Q. You have said you made no comment and took no action. Why was that?

Mr. JOHNSON: About which, Mr. Darlington? The Kann talk?

Mr. DARLINGTON: No; when Louis Kann gave him the information.

By Mr. DARLINGTON:

Q. You have said that when Louis Kann gave you the information you made no comment and took no action. Why was that? A. Because I knew that the lease contained a covenant upon the part of the Kings to pay the taxes, and I did not make any comment or take any action because it seemed to me to be a dangerous situation.

Q. Dangerous in what respect? A. Dangerous for the Kings, and possibly dangerous for Mrs. Kennedy.

Q. Why did you not do something? Why did you not then take up the matter of purchasing the tax title? A. I did not consider that the time had come for me to take any action.

Q. Why? A. Because I had received this information from Mr. Kann. It was a bare statement of something that might be true and might not be true, and I was not going to meddle in it at all.

Q. You have not yet told me why, Mr. Cohen. What reasons existed on September 30, for your buying this tax title, which

641 did not exist on September 19th and 20th? A. The reason that Mr. Webb had come to me on the 30th of September and asked us whether or not we would take the property; that Mrs. Kennedy had decided to forfeit the lease.

Q. Will you explain why that suggested your buying the tax title, when you had then a present prospect of getting possession for the Kanns without a tax title, and yet the knowledge of a tax sale ten days earlier, when you had no prospect of getting the premises, did not suggest it? A. I think the reason is self-evident, because of my acquaintance with Mrs. Kennedy, and because of the relations that I knew existed between her and the Kings.

Q. Were you better acquainted with her on September 19th or 20th than you were on September 30th? A. I was better acquainted with the facts, in that on the 30th of September I knew Mrs. Kennedy had decided to evict a dangerous tenant, which I did not know on the 19th of September.

Q. What do you mean by a dangerous tenant? A. A tenant that had allowed the property to be sold for taxes when she was under obligation to pay them.

Q. When did you first know this tax sale was irredeemable? A. On the afternoon of the 30th of September.

Q. And as a lawyer you knew that until it did become irredeemable Mrs. King could take it up without Mr. Wiltsie's consent, did

you not? A. I knew that, sir; but I also knew that Mrs.
642 King was under obligation to pay the taxes when they matured, and that failing to do so she had violated her lease.

Q. You knew a tax certificate or sale, so long as it was redeemable, was of no value except for its face and interest, did you not? A. I presume so.

Q. It was from Mr. Webb that you learned that this certificate had become irredeemable? A. Yes, sir; as I have stated.

Q. And that Mr. Wiltsie held it? A. And that Mr. Wiltsie held it.

Q. And it was upon that information you conceived the idea of buying this tax title? A. No, sir.

Q. Then on what information was it? What other information was it? A. No other information, sir; I conceived the idea to purchase this tax title because of the fact that I wished to be in possession of a club that I could use as necessary against either Mrs. Kennedy or Mrs. King.

Q. And you knew this certificate was a club because it was irredeemable, did you not? A. I believed so. I believed it might prove so. I couldn't tell.

Q. And you got that information from Mr. Webb? A. Not that it was a club, sir.

Q. That it was irredeemable? A. The fact that the tax
643 sale had become irredeemable, I did, as I stated before, receive from Mr. Webb, and that it was held by Mr. Wiltsie.

Q. And you knew it would not be a club unless it were irredeemable, did you not? A. I can't say that that is a correct statement of fact, Mr. Darlington.

Q. In what respect is it incorrect? A. That I knew it would not be a club if it were not irredeemable. I did not consider that had any bearing whatsoever upon the rights that Mrs. Kennedy had to evict a dangerous tenant, one who had failed to observe the obligations of her lease.

Q. Mr. Cohen, without any fencing, did you not know perfectly well that so long as this tax certificate was redeemable it would not be a club over Mrs. Kennedy's head, in your hands, or in the hands of anybody else? A. It might not have been, sir.

Q. Do you not know it would not have been, that she could have vacated it no matter who held it until it should become irredeemable? A. I can't see what bearing that had upon the right of Mrs. Kennedy to evict this tenant.

Q. You told us you bought this tax certificate to hold as a club. A. If necessary.

Q. And you knew it would not be a club over Mrs. Kennedy's head unless it was irredeemable? A. Over Mrs. Kennedy's head?

644 Q. Yes. A. As I say, my ideas on the subject were somewhat nebulous.

Q. Can you not answer yes or no to a question like that? A. I want to tell you the exact truth, and for that reason I can not.

Q. I will ask you once more: Is it possible you did not know in October, 1901—— A. October?

Q. September or October, 1901, that a tax sale certificate would not be a club over the owner's head so long as it was irredeemable? A. I must have realized that.

Q. So your knowledge that it would be a club was obtained from Mr. Webb? I will strike that out. Your knowledge of the facts which made it a club came from Mr. Webb, did it not? A. I don't think that is exactly a fair question, Mr. Darlington.

Q. In what respect? A. You characterize it as a club.

Q. I am using your language, not mine.

Mr. JOHNSON: One moment. I object on the ground that Mr. Cohen has stated at least six times in the course of his cross examination that he got his information as to the irredeemability of this tax certificate from Mr. Webb, and that every other question which has been asked in respect to it has been merely an argumentative one.

645 By Mr. DARLINGTON:

Q. Now, once more: Have you not said that you bought that certificate because you thought it might be a club over Mrs. Kennedy's head? A. I have said that I bought that certificate for the purpose of using it as might be necessary, either as a club over Mrs. Kennedy or over Mrs. King.

Q. Now, I am asking you if the fact which made it a club over Mrs. Kennedy's head, namely, the fact that it was irredeemable, was not communicated to you by Mr. Webb? A. I might have learned that fact in any way, Mr. Darlington, from the public records, or otherwise.

Q. Do you understand me to ask you how you might have learned that fact? A. The reason why I do not answer your question yes or no is because you are joining in that question to me something that I consider unfair, by designating Mr. Webb's action as a club, and for that reason I have answered as I have.

Q. Once more, Mr. Cohen. I think if you will attend to my question you will see it is not open to the criticism you make. I ask you once more if it is not true that the fact which conveyed to your mind that this tax certificate might be a club over Mrs. Kennedy's head first came to you through Mr. Webb, namely, the fact that the certificate was irredeemable? A. I have stated again and again that the fact of the irredeemability of this tax certificate came
646 to me from Mr. Webb, and I repeat it.

Q. It came to you in a treaty between you and him for a lease from his client to your client. Is that true? A. That depends upon your use of the word treaty.

Q. Call it negotiation. We are not splitting words here. A. It

came to me as a statement from Mr. Webb, after I had informed him that my client would take the property at $300 per month.

Q. It came to you from him in the course of negotiations between you for a lease to your client from his client, did it not? A. If you call them negotiations, yes sir.

Q. Is it possible for you to say yes or no*t* to that question? A. I think the proper answer to that question is yes.

Q. Then I will be obliged to you for the proper answer when you can give it.

Mr. JOHNSON: I want again to enter an objection to the line of cross examination, as not calling upon the witness to state facts, but as an endeavor to get the witness to assent to or negative characterizations of facts which counsel is undertaking to make.

By Mr. DARLINGTON:

Q. You testified tonight, as I understood you, that at your first interview with Mr. Webb, on September 30th, you asked him
647 why he was inquiring whether the Kanns would take a lease; that he then told you about this default in the payment of taxes; and that you told him you had heard that previously from the Kanns. Is your recollection entirely clear that this conversation took place at your first interview with Mr. Webb on September 30? A. Perfectly.

Q. Do you remember a conversation you had with me at my office on the 30th day of October, 1901? A. Yes, sir.

Q. Do you remember telling me on that occasion that when Mr. Webb asked you if your client would take a lease of the King property, you knew, without his telling you, that he had learned of the defaulted tax payment, and that you did not have to be hit in the head with a brick to understand that Webb thought the lease had been forfeited? A. I did not say that.

Q. You deny having said that, do you, Mr. Cohen? A. Most positively.

Q. What was the object of your statement to Mr. Webb that your clients would give $300 and taxes if possession was given, and that offer was not to be used to compel King to pay a higher rent? I refer more particularly to the latter part of the statement, namely, that their offer should not be used to compel the Kings to pay a higher rent? A. The object of that was so that Mrs. Kennedy should not be in the position of hunting a tenant at a higher figure, and auctioning the property off between the two.

Q. The object was to have Mrs. Kennedy accept that offer
648 without going to the Kings and giving them an opportunity?
A. I have stated the object in my answer to the previous question, Mr. Darlington, and you have not stated it in your question now, sir.

Q. Was there any other object than to prevent Mrs. Kennedy from

offering the property to the Kings? A. That was not the object, sir. Hence there could not have been any other.

Q. The object was to protect the Kings from Mrs. Kennedy's efforts to get a higher rent than $300, was it not? A. I have stated what the object was, sir.

Q. At which of your interviews with Mr. Webb, on September 30th, was it that the terms of a lease between Mrs. Kennedy and the Kanns was agreed upon between them?

Mr. PERRY: Mr. Perry objects to this question as containing, unintentionally, a misrecital of what the witness has said. The witness said explicitly that one of the very important terms, to wit, the length of the tenancy, was not agreed upon.

A. I will answer the question by saying that so far as I was concerned, I believed Mr. Webb had made an agreement of lease with me at the second interview, when I notified him that my client would pay $300 a month for the property, so far as any unwritten agreement between us could settle it. He had made a statement and I had made one to him, and it was a word of honor between gentlemen.

Q. Let me read you from your answer, paragraph 8, on page
649 41 of the Court of Appeals record: "When this defendant informed the said Webb that his clients would take a lease of said premises on the terms stated as hereinbefore set forth, the said Webb agreed to said proposal, and in behalf of his client accepted the same, and this affiant supposed there was no doubt, and still believes that there is no doubt whatever of the legal and moral right of the lessor to terminate the lease and evict the tenant for default in the payment of taxes, and that as the said Webb informed this defendant that his client had so decided, and would refuse the rent the next day when it was tendered and proceed to evict the tenant, this affiant regarded the matter of the lease to his client as settled, so far as an unwritten agreement could settle it." Does that correctly state the facts? A. I have so stated and believe that it does correctly state the facts.

Q. Now let me read from your affidavit in this case, which is on page 3 of the supplement to the record: "About one p. m. this affiant informed said Webb of his client's answer to said Webb's inquiry, and the said Webb then and there agreed, in behalf of his client, Mrs. Kennedy, to give affiant's client a lease of the said premises on the terms stated." Does that correctly state the facts? A. It is something about which Mr. Webb and I have honestly differed.

Q. I am not asking that at all. A. I am answering your question.

650 Q. No, sir, you are not answering. A. I believe that it does correctly state the facts.

Q. Have you any doubt about it? A. None beyond the fact that Mr. Webb thinks that I misunderstood him.

Q. What term of lease was agreed upon between Mr. Webb and yourself? A. No term. Nothing was said about a term.

Q. And yet you thought you had a lease? A. I thought I had Mr. Webb's word that the Kanns should have a lease, and I considered that morally as good as having it.

Q. So that that might have been a lease for a month or ten years? A. Well, when we came to draw up the terms of the lease, Mr. Darlington, I presume that we might have agreed about that.

Q. I am not asking what you might have agreed to. I am asking what you have sworn to here in your answer on page 41, that you regarded the matter of a lease to your client as settled, so far as an unwritten agreement could settle it. A. Yes, sir.

Q. You thought the lease was settled, though no term was specified, did you? A. I thought the matter of terms could be agreed upon when we came to draw up the papers themselves.

Q. How long had you been practicing law at that time,
651 in 1901? A. I decline to answer that question.

Q. When you suggested to Mr. Webb that he buy this tax title, you say he told you there was no necessity for that? A. That is what he said, sir.

Q. Were you then and there willing to proceed and make an agreement for a lease with the knowledge that there was an outstanding tax sale against it, and without any provision for its being adjusted or settled? A. The agreement for lease, as I understood it, preceded the remark that Mr. Webb made about the tax sale, about Mr. Wiltsie, or my suggestion as to his purchase of it.

Q. That is, you had agreed about the lease, as you understood it, before this matter of buying the tax title was mooted? A. In that conversation, yes sir.

Q. Then I repeat my question: Knowing as you say you knew from Mr. Webb that this tax certificate was outstanding, were you willing to proceed and agree upon a lease without any provision for getting in that tax title? A. I had already done so.

Q. How do you explain that, Mr. Cohen?

Mr. JOHNSON: Explain what, that he had already done so?

Mr. DARLINGTON: His conduct in agreeing upon a lease with the knowledge that there was an outstanding tax sale against it, and no provision for getting that in?

A. I don't understand the question at all, Mr. Darlington.
652 If you want me to argue the question as to why I did thus and so, or state facts, I wish you would put your question in a little different form.

Q. We will dispense with any argument; but I would like you to explain why it was that you were agreeing in behalf of your client to take a lease of property which was sold by irredeemable tax sale to other people? A. You ask me then to defend by argument my course of action in having agreed to take a lease, and

then afterwards, knowing that the tax title stood against the property, not making provision for it. Is that your question?

Q. Have you not testified that Mr. Webb told you at your first interview on September 30th, about this tax sale, and that it was at the second interview that you made the agreement for the lease? A. I have not, sir: and your question is misleading, in that you say that Mr. Webb told me of the tax sale at the first interview. I have stated that he told me that Mrs. King had not paid her taxes at the first interview.

Q. You did not know at that interview, then, that the property had been sold for taxes. Is that right? A. I stated that at this first interview I also informed Mr. Webb that Mr. Knight had given the information to Mr. Kann, and that Mr. Kann, in turn, had given it to me. Mr. Webb's statement to me was not of a tax sale, but that the tenant had not paid the taxes.

Q. Did you or did you not know at the time of your first interview with Mr. Webb that the property had been sold for
653 taxes? A. I had the information which Mr. Knight had given Mr. Kann, and which Mr. Kann had repeated to me.

Q. And that was information that there had been a sale? A. Yes, sir.

Q. Then I will ask you again, how was it that you, on behalf of your client, agreed to take a lease of this property from Mrs. Kennedy with the kowledge that the property had been sold to somebody else for taxes and that that sale was outstanding? A. My agreement was made with Mr. Webb in response to his call on me to ask whether or not the Kanns would take the property. I replied to that, at the second interview, that they would.

Q. The question is repeated.

(The question was read by the stenographer.)

A. I am unable to answer that question any further than I already have.

Q. How was it that with that knowledge, and when Mr. Webb told you there was no necessity for his buying it in, you did not explain to him that it would be important for your clients if they were to take a lease to have this tax title gotten in? A. I presume at that time I did not consider it so.

The further cross-examination of this witness, and the further taking of these depositions was thereupon adjourned until Tuesday, November 17th, 1903, at 8 o'clock p. m.

654 WASHINGTON, D. C.,
November 17, 1903—8 o'clock p. m.

Met pursuant to adjournment.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendant Webb, Mr. Perry.

Present on behalf of the defendants Cohen and Kann, Mr. Johnson.

Cross examination of MYER COHEN, resumed.

By Mr. DARLINGTON:

Q. Mr. Cohen, you have said that the Kanns have a frontage on Market space of about 160 feet, 100 feet being east and 60 feet being west of the King property. That is correct, is it? A. About that, I think.

Q. Let me show you a page of the Washington Post, of November 1st, 1903, and ask whether that presents a fairly correct view of the premises on the Market Space front? A. (After examination.) I think it does, that and the Eighth Street front.

Q. I am speaking of the Market Space front. A. From here out (indicating) is the Eighth Street front.

655 Q. And the Eighth Street front? A. Yes; I think so. I think that is about right.

Q. On the Market Space front the property in controversy is the small building having no signs on it, is it? A. That is right, sir.

Q. That is the property which is in controversy in this suit, and which the Kings have occupied for some fifteen or more years? A. I think they have occupied it about—this is the property in question, but whether they have occupied it fifteen or more years I am not prepared to say.

Mr. DARLINGTON: I offer this in evidence.

Mr. JOHNSON: Which, the picture or the "Post"?

Mr. DARLINGTON: That is about all there is of it. I offer this page of the "Post," containing the cut in question.

Said paper is filed herewith, marked Exhibit Cohen No. 2.

The WITNESS: There are a few inaccuracies, I think, on this—what would you call it, a photograph or photolithograph?

Q. This picture. A. A few inaccuracies, on this picture, I should say. For example——

Mr. PERRY: Before this is offered in evidence, I want to enter an objection to it as irrelevant.

A. For example, the name "Kann's" on the water-tower over here I do not think is accurate, and the building in the rear of what was formerly the Smith building, as presented in this photograph, is the ell of the Saks building, right here (indicating). Otherwise I think it is quite accurate.

656 By Mr. DARLINGTON:

Q. How, and when, did you learn the terms of the King lease, Mr. Cohen? I mean that feature of it that provided for the payment of taxes, and for forfeiture if they were not paid? A. I don't remember when, nor how.

Q. As that is rather an important matter, I will ask you to take a little time and think about it, and give us the best information you can as to the manner and time in which and when you became advised of that feature of the lease? A. I am unable to say, Mr. Darlington.

Q. Can you give us any period of time prior to September 30th, when you knew of that provision of the lease? A. I am certain that I knew it long before that, but how long I don't know.

Q. What enables you to say you are certain you knew it before that time, if you can give us neither the time nor the manner in which you became informed of it? A. I think I read that lease on the court records.

Q. When, and on what occasion? A. And if you can tell me when it was recorded, I think I can tell you when I read it.

Q. What led to your reading it? A. I don't remember.

Q. You are not in the habit of reading all the papers that are recorded among the land records, are you, Mr. Cohen? A. No, sir.

657 Q. Just turn your memory back and see if you can not remember what led you to hunt up this lease on the record and read it?

Mr. JOHNSON: He did not say he hunted it up on the record.

Mr. DARLINGTON: If Mr. Johnson prefers me to say so, I will ask you how you came to read it without hunting it up on the record?

Mr. JOHNSON: I do not prefer it that way. The witness has not made use of that expression.

A. Just read the question please.

The question was read by the examiner as follows:

"Q. Just turn your memory back and see if you can not remember what led you to hunt up this lease on the record, and read it?" A. I am unable to say, sir.

By Mr. DARLINGTON:

Q. Please look at the lease itself, which I now hand you, and which appears to be witnessed by you, and tell us where you witnessed it. A. Is this the original lease?

Q. That is the original lease. Do you not recognize your attesting signature? A. I do. This was the lease which you said you would produce at the last hearing?

Q. It had been filed for some time. A. In the cause?

Q. Yes. My question is, Tell us where you were when you witnessed that lease. A. This was witnessed by me in an ac-

658 knowledgment taken on the 8th day of July, A. D. 1890. To the best of my recollection I was then in the city of Wash-

ington, and the lease was signed and acknowledged before me at that time, but I am unable to state at what particular point the acknowledgment was taken. I don't remember.

Q. Were you acquainted with Mrs. Kennedy at that time? A. I think not, sir.

Q. As a matter of fact were you not present, and did you not take that acknowledgment as representing the Kings, or rather Mr. Henry King, Jr.? A. I believe not. My recollection is that I was merely acting as notary.

Q. Where was your place of business at that date? A. 921 F street, northwest.

Q. That was not the residence of Mrs. Kennedy, was it? A. No, sir.

Q. And that was not the office of Mr. Webb, was it? A. No, sir.

Q. Do you claim that Mrs. Kennedy was present at 921 F street when that paper was acknowledged before you, or did you go somewhere to see her and take the acknowledgment? A. I have made no claim whatsoever, Mr. Darlington. I simply say I don't remember at what place this lease was signed before me. It might have been acknowledged in my office. It might have been acknowledged in Mr. King's place of business. It might have been acknowledged at Mrs. Kennedy's house. I don't know.

659 Q. Are you able to say you did not attend on Mrs. Kennedy at Mr. King's request, and take the acknowledgment of Mrs. Kennedy to the lease? A. I am not able to say that.

Q. Now, will you please look at the five years' extension of this lease, dated December 27, 1892, and tell us, if you know, in whose handwriting is that extension? A. That extension, I should say, is in the handwriting of Mr. Simon Wolf.

Q. What business relationship, if any, did you and do you sustain to him? A. Partner.

Q. That extension is witnessed by your partner, is it? A. Yes, sir.

Q. In whose handwriting is the acknowledgment to that extension on the next page? A. Mr. Adolph G. Wolf.

Q. And what is his relation to you? A. He is now a partner, but at that time he was not.

Q. What was his relation to the firm of Wolf & Cohen at that date? A. I should say he was a law student in our office at that time.

Q. Now, please look at the further extension for a further term of five years, made in October, 1896, and tell us in whose handwriting that is? A. In the handwriting of Mr. Adolph G. Wolf.

Q. And what was his business and connection with the
660 firm of Wolf & Cohen at that date? A. He was a partner at that time.

Q. Was he also a partner in September and October, 1901? A. Yes, sir.

Q. You observe from an inspection of this lease, do you not, that the original term expired on the first day of October, 1893? A. It

appears to have been for a term of three years from the first day of October, 1890.

Q. And its extension beyond that time depends entirely upon extensions made by your firm or in your office, does it not?

Mr. JOHNSON: I object to that as calling for a conclusion of law upon the instrument.

Mr. DARLINGTON: No, the paper itself.

Mr. JOHNSON: The question is not whether the extensions were drawn by the firm or in his office, but whether the extensions hinged upon acts of the firm.

A. I should say, in answer to that, that the extensions speak for themselves, and that the fact that they were in the handwriting of members of my firm has nothing whatever to do with the fact of the extension.

Q. Was your firm, or were its members, at any time within your knowledge, attorneys for Mrs. Kennedy? A. Never; nor for Mr. King.

Q. How do you account for the fact that these extensions, then, are prepared by members of your firm? A. As I understand
661 it they are practically notary work, which Mr. King had done.

Q. Please look at the first of these extensions which you say is in the handwriting of Mr. Simon Wolf, and tell us what notary work you recognize in connection with that extension? A. My recollection about that is that Mr. Wolf wrote that——

Q. Will you not please answer my question first, and then make any explanation you wish? A. What is the question?

(The question was read by the examiner.)

A. I think it was intended that he should act as notary, and for that reason he wrote that at the request of Mr. King.

Q. Did he act as notary? A. He did not.

Q. Was he a notary at that time? A. I believe he thought he was, and under that mistake prepared to act as notary.

Q. What makes you believe that, Mr. Cohen? A. I have some slight recollection of that being so. I am not certain of it.

Q. You say you have been a lawyer about 16 years? A. Since 1887.

Q. Do you know of any law under which contracts for the extension of leases are notarial work or incident thereto?

Mr. JOHNSON: Are you referring to a statute, now?

Mr. DARLINGTON: I am referring to any kind of law Mr. Cohen may be familiar with.

662 A. I know of no law, but I do know of a custom which exists to that effect.

Q. Now look at the acknowledgment to the extension which I mentioned, and see if that is not a distinct form in a different handwriting? A. It is, as I have testified.

Q. That, you say, is in the handwriting of Mr. Adolph Wolf, who was a notary? A. Yes, sir.

Q. Now, please look at the second extension and the acknowledgment following it, and see if they are not separate and distinct acts, one being an agreement between the parties, and the other the notary's acknowledgment? A. They appear so, and to have been done at the same time.

Q. What was your authority for your statement at the last session, that Mr. Tobriner was always the attorney for the Kings? A. My own knowledge and Mr. Tobriner's testimony.

Q. Do you know of any instance in which he acted as their attorney prior to the death of Mr. Henry King, Jr.? If so, state it. A. At the time Mr. Emil Stiebel failed, and Mr. Henry King was the preferred creditor, an assignment which took place before the law of 1893 went into effect, I understood that Mr. Tobriner represented Mr. King at that time.

Q. From whom did you understand that? A. I think Mr. King himself told me so during his lifetime.

663 Q. Is it not a fact that Mr. Tobriner acted on that occasion as attorney for Mr. Stiebel? A. I think he did, sir.

Q. When did that occur? A. I don't remember the year, sir.

Q. Back in the '80's, was it not? A. I don't remember the year. It was before 1893.

Q. Yes, it was before 1890, was it not? A. I am not sure. I don't remember.

Q. Now, can you recall any other instance in which, as you think, Mr. Tobriner acted as attorney for Henry King, Jr., or for any of the Kings, prior to the death of Henry King, Jr.? A. At the present moment, I do not recall.

Q. If a little time is taken, so that you may think the matter over, do you think you can recall any? A. I might be able to do so.

Q. Please take all the time you want for that purpose? A. I don't remember at this moment, Mr. Darlington, any particular thing that Mr. Tobriner represented Mr. King in, but I do remember his stating in his testimony that he was the attorney for the Kings, since the death of Mr. Henry King, and for some years, as I recall it, before that, represented Mr. King. I think I can find you the place in the evidence, if you would like to see it.

Q. Is your knowledge upon the subject based upon what Mr. Tobriner stated since this controversy began? A. No, sir. I

664 believe, as I have stated before, that Mr. Tobriner represented Mr. King as his attorney.

Q. But you cannot remember any instance? A. At the present moment I can not.

Mr. PERRY: Any instance, did you say?

Mr. DARLINGTON: Yes; in which he did so.

Mr. PERRY: The witness has given one.

A. Naturally, except the one which I have stated. I think that stands to reason.

By Mr. DARLINGTON:

Q. Do you remember a loan made by Mr. Henry King, Jr., on certain property on E street between 5th and 6th streets? A. Between 5th and 6th?

Q. Yes, on the south side? A. I think I do. I think we made that loan to him.

Q. Who negotiated that loan to him? A. We did, sir. We negotiated various loans for Mr. King, and did various kinds of business for him, as I stated the other night. It is possible we may have rendered him legal services, but we did not, at least I did not, consider this firm to be his attorneys.

Q. You say your second interview with the Kanns, on September 30, was between 3 and 4 p. m., do you? A. My second interview with the Kanns?

Q. Yes. A. Is that the question you mean to ask me, Mr. Darlington?

665 Q. Yes. A. Then you call my telephonic conversation with Mr. Sigmund Kann my first interview, do you.

Q. No. A. When did the first one take place, sir?

Q. I am asking you. A. You asked me for the second one.

Q. Yes, if that is not the second one say so. A. If you know it is not the second, why do you ask me, sir?

Q. You are on the witness stand. I want your recollection of these things. A. I had one telephonic communication with Mr. Sigmund Kann after Mr. Webb called to see me. Later in the day, after I had seen Mr. Webb, I had one conversation, not the second conversation, with the Kanns.

Q. Your first interview with them, then, was between 3 and 4 p. m., was it? A. About that, sir.

Q. On that occasion you say you gave them all the details of your second interview with Mr. Webb? A. Yes, sir.

Q. Please tell us just what details you gave them? A. I repeated the fact of Mr. Webb's call upon me, and his statement, as I had previously told them over the telephone. I repeated to the Messrs. Kann my statement to Mr. Webb that the Kanns would take the property at $300 per month and taxes, provided possession was given them, and provided their offer was not used as a means

666 to induce the Kings to pay a higher rent. I told them that Mr. Webb had told me that the rent would be refused if tendered. I told them that Mr. Webb told me that the tax sale had become irredeemable by lapse of time and that it was held by Mr. Wiltsie. I told them that I suggested to Mr. Webb his purchase of the tax certificate, and that he replied that it was not necessary, and that I had jestingly said, "I believe I will buy it," to which he replied, "Oh, no, don't do that."

Q. Are you able to produce the record of the tax sale which you say Mr. Newton showed you? A. I have made no effort to do so. You mean now, I presume?

Q. Yes; at our last session I objected to testimony in regard to that record unless it was produced. A. I have made no effort to do so.

Mr. JOHNSON: I did not understand there was any call for the production of that, but I will say this, I will produce it.

Mr. DARLINGTON: Very well.

By Mr. DARLINGTON:

Q. Subject to its production, I ask the following questions: Did that record show in whose name the property was assessed? A. I don't remember.

Q. Did it show how soon after the sale a report of the sale had been filed with the recorder of deeds? A. I don't remember, but I don't think so.

667 Q. Did it state the amount of taxes that were due, and for which the sale was made? A. I am quite sure it did not, although I am not absolutely certain.

Q. Did it state the amount paid for the property by the purchaser at the tax sale? A. I don't think so.

Q. Did Mr. Newton make any examination of these requisites preliminary to a tax sale, to ascertain whether they had taken place or not, before giving you his opinion about the tax title? A. At that time?

Q. Yes. A. No, sir.

Q. You knew, did you not, that property was required to be assessed in the owner's name, in order to make a valid tax sale?

Mr. JOHNSON: Are you asking the witness his opinion of the law?

Mr. DARLINGTON: No; if he knew the language of the requirement of the law.

Mr. JOHNSON: Which is it? Are you asking his knowledge of the law, or asking him to recite the language of the statute?

Mr. DARLINGTON: I am asking for his knowledge of the law.

A. I had no opinion on the subject.

By Mr. DARLINGTON:

668 Q. Did you not know that a tax sale had to be recorded within a specified time after the sale under the law? A. I don't remember whether I knew it at that time or not.

Q. Did you not know that the report of the sale had to state the amount of taxes that was due under the law? A. I don't remember whether I knew it at that time or not, but I think not. I mean to say I think I did not know it.

Q. You knew that there were some preliminary steps required to be taken in order to make a tax sale, did you not? A. I had no definite knowledge on the subject.

Q. And you knew as a lawyer, that the validity of a tax sale would depend upon the observance of these requirements, did you not? A. I had no opinion on the subject at that time.

Q. I am not asking about your opinion. I am asking if you did not know as a lawyer that a tax sale would not be valid unless the requirements of the law were complied with in making a sale? A. I might have known it, but it is possible I did not.

Q. Did Mr. Newton undertake to give you an opinion upon the validity of this sale without making an examination to see whether these requirements had been complied with or not? A. Only in the manner that he did.

669 Q. What manner was that? A. I should say his general conversation.

Q. Just tell us what he said and what he did? A. I discussed the matter of tax titles under this law with regard to the sales of——

Q. Just tell us what he said. Whether you discussed it with him will not help us any. Tell us what he said, as nearly as you can. A. I don't know that I can recall the exact language, beyond what I stated the other day when I was last on the stand, the statement that Mr. Newton made that the new law was very much more exact than the old tax law had been, and that if one could obtain peaceable possession of property to which one had tax title, he might hold it against the world.

Q. Was that all he told you? A. I didn't catch the question.

Q. Was that all the opinion he gave you on the subject? A. Therefore that he thought this tax title was good.

Q. That if you could get peaceable possession you might hold it against the world, and therefore it was good? A. No, sir; I think the statement about the tax title being good was a conclusion.

Q. A conclusion from his opinion that if you could get peaceable possession he thought you could hold it against the world? A. I don't know how I can say what Mr. Newton's intention was in making that statement to me.

Q. I do not ask you about his intention. I want you to
670 tell us all he said on that subject. A. I have told you, as far as I know, all that he said.

Q. Did you not know, as a lawyer, without being told by anybody, that the validity of a tax sale would depend upon at least substantial compliance with the preliminaries required by the law? A. I had no general opinion on the subject at the time.

Q. And you did not know that? A. I might have known it.

Q. Do you doubt that you knew that much, Mr. Cohen? A. I am under oath, sir, and therefore I want to say I might have known it and I might not. I am not certain.

Q. Do you mean you doubt whether you knew at that time that a tax sale would not be valid if the requirements of the law in regard to it had not been at least substantially complied with? A. I don't mean to say I doubted it, but I mean to say I don't know whether I knew it to be so or not.

Q. I ask you whether you now doubt whether you knew that at the time? Do you now doubt whether you knew at the time that a tax sale would be void unless the prescribed preliminary steps

were at least substantially complied with? A. I am inclined to think I did not know it, possibly, at that time.

Q. And do I correctly understand that all Mr. Newton told you, or substantially all that he told you, was that the new law
671 was more exact than the old law and that if you could get peaceable possession he thought you might hold it as against the world? A. And also what I have stated above.

Q. What is that? A. His conclusion that he thought these tax certificates were good.

Q. His conclusion from what? A. His concluding remarks.

Q. Will you produce the bill you paid him for this advice? A. Yes, sir.

(The witness produces a paper.)

Q. This is a bill for $5? A. Yes, sir.

Q. So that you had the District Title Insurance Company's office held open after hours, were granted the inspection of their records, and you got a legal opinion from the president on the validity of a tax sale, all for $5? A. I considered the opinion of Mr. Newton to have been a personal expression of his opinion to me, and the bill that I paid was the one he rendered. If he had charged me $50 I would have paid it.

Q. I observe that this bill is dated October 4, or four days after September 30, the day after the deed was recorded. How do you account for that? A. No other services were rendered by the title company except the ones I have stated. The bill, when rendered, was paid, and was understood to be for that particular
672 service.

Q. I call your attention to the fact that the bill was not paid until October 28, and I ask how you explain that? A. Oh, Mr. Darlington, the bill was put on the file, and handed to the bookkeeper as bills usually are, and paid within the current month. That is the practice.

Mr. DARLINGTON: I offer this bill in evidence.

The paper referred to is filed herewith, marked Exhibit Cohen No. 3.

By Mr. DARLINGTON:

Q. Now, I want to read you from your answer to paragraph 8 of the bill. I read from page 43:

"This defendant then telephoned to Baltimore to the defendant Sigmund Kann, and informed said Sigmund Kann that he had been advised by the president of the said title company that the said tax sale was valid."

Also from your answer to the same paragraph, on page 42:

"This defendant consulted the president of said company and asked his opinion as to the validity of said tax sale certificate, and was advised by the president of said company that in his opinion the

said certificate was good and valid, and would pass a good title to said premises; for which consultation and information this defendant paid to the said company its charge."

Is that correct? A. Yes, sir.

673 Q. I thought you told us to-night that he said if you could get peaceable possession you might hold it against the world. Was I in error about that? A. I did say that.

Mr. JOHNSON: Is that question, did he say that?

Mr. DARLINGTON: I asked if this was correct.

Mr. JOHNSON: If it is correct that Newton said that or that the witness said that? You said something about his testifying tonight. I am trying to get at the drift of your question.

Mr. DARLINGTON: I am simply asking if the statement in his answer is correct.

The WITNESS: Then you asked me something else.

By Mr. DARLINGTON:

Q. Do you now say he told you this certificate would pass a good title to the premises, whether you got peaceable possession or not? A. Why, Mr. Darlington, when I answered your question preceding this, it was a correct statement of what Mr. Newton said to me.

Q. Did Mr. Newton tell you that the tax sale certificate would pass a good title to the premises, whether you got peaceable possession of the premises or not? A. I so understood it. One moment. I did not catch the last part of the question.

The question was read by the examiner, as follows:

"Q. Did Mr. Newton tell you that the tax sale certificate would pass a good title to the premises, whether you got peaceable
674 possession of the premises or not?" A. I understood him to make the first statement that your question asks for, but he did not make such a remark as you have made at the end of your question.

By Mr. DARLINGTON:

Q. Then he did not advise you that the tax certificate would pass a good title to the premises, did he? A. Your question to me was whether or not it would pass a good title whether peaceable possession was obtained or not.

Q. Yes. A. All that he said in that connection was that if peaceable possession was obtained the holder of such a title might hold the premises against the world. He also, as I have stated, said in the concluding remark that he considered the tax certificate a valid one.

Q. And he did this without making any examination as to compliance by the District authorities, with the requirements of the tax sale law? A. As I so understand it, yes, sir.

Q. And you say you are not sure whether you knew that sub-

stantial compliance with those requirements would be necessary to a valid tax sale? A. I have stated that.

Q. Mr. Cohen, I want to read to you your account of your last interview with Mr. Webb on September 30, and I want you to tell us if you think that testimony gives all that took place between you and Mr. Webb on that evening: "I opened the conversation by saying to Mr. Webb, 'Mr. Webb, I
675 am going to Rochester tonight to buy that tax certificate and you and I must deal at arms' length. I thought it proper to come and tell you of this because of our talk this afternoon.' He said 'Oh, Mr. Cohen, I wish you wouldn't do that. I don't know about that;' and I replied in a very positive way 'Well, I do.' He then continued to urge me not to add that complication to the matter, and said 'You know I mentioned the fact of this tax title to you myself.' I then reminded him, as I had informed him that morning, that I had first heard it through Mr. Kann, who had been told of it by Mr. Knight, who in turn had informed Mr. Webb." Then in reply to Mr. Johnson's question: "Q. Can you recall any further conversation between you and Mr. Webb, any remark that you made or that he made," you answer: "I think that is all that took place." Do you remember nothing else? Or, to be specific, do you remember whether or not Mr. Webb told you, as the conclusion of that conference, that he did not see that he could prevent you from doing what you were proposing? A. In answering Mr. Johnson's question the other night, I stated it as I recalled the circumstances, but it may be that he made such a statement to me. I am not sure.

Q. Such a statement as I have last asked you about? A. As you have last stated. I am inclined to think he did.

Q. Let me call your attention to your answer to the eighth
676 paragraph of the bill, reading from the bottom of page 42: "The said Webb still indicated his objection to this defendant's course, but remarked that he did not see how he, the said Webb, could prevent it." Does that refresh your recollection as to the remark? A. It does.

Q. Why was it, Mr. Cohen, if in that conversation you reminded Webb that you had told him at your first interview that you had learned of the tax sale through Mr. Kann, your answer is wholly silent on that subject, when the matter was fresher in your mind then than it would naturally be now?

Mr. PERRY: Does he not state that in his answer?

Mr. DARLINGTON: No.

Mr. PERRY: Then I am not reading it right.

A. Are you not mistaken about that, sir?

Q. Set me right if I am. A. I would like you to read the lines beginning "Whereupon this defendant corrected said Webb's statement, reminding said Webb that this defendant had not received

his information of the tax sale from said Webb, but that he had known it long before said Webb had."

Q. I am asking why you did not set out in your answer that you reminded him at your second interview that you had told him that at your first interview on that day, if you had in fact done so; and I am doing this in connection with your denial at our last meeting of having told me on October 31 that you did not need to be hit on the head with a brick to know at your first interview that Mr. Webb had learned of this defaulted tax sale. A. The only answer
677 I can make to that question, Mr. Darlington, is that on page 40, opposite the figures 78, I have stated the circumstances of my interview with Webb and that I there had set out the fact that you now ask about.

Q. I want to further call your attention to page 43 of the printed record, setting forth your answer: "This defendant does not know of any effort that the said Webb or the said Kennedy made to prevent the acquisition of said tax title by this defendant, nor does he know of anything either of them could have done to prevent the same." What did you mean by that?

Mr. JOHNSON: What did he mean by those words?

Mr. DARLINGTON: Certainly, Mr. Johnson; what does he mean by that?

A. I mean that I was doing something that I thought I had a lawful right to do, and I saw no way in which Mr. Webb or Mrs. Kennedy could prevent me from doing that which I thought I had a right to do.

Q. Did it not occur to you they could protect their own interests by communicating with Mr. Wiltsie, or seeking themselves to buy this tax title? A. I can't say whether that occurred to me or not. I state here that I do not know of anything that either of them could have done to prevent the same. They could not have prevented me from leaving town. They could not have stopped me by an injunction, or writ of *ne exeat* so far as I knew.

Q. You state you know of nothing either of them could have done to prevent your acquisition of the tax title. Do you
678 know of any reason why, with this warning, Mr. Webb could not have communicated with Mr. Wiltsie, or could not have gone on to see him as well as you could, to protect the title of his client?

Mr. JOHNSON: Do you call for the witness' personal knowledge of Mr. Webb's capacity?

Mr. DARLINGTON: I think my question is perfectly plain. I am asking him to explain his own answer.

Mr. JOHNSON: You are not. You are not asking him to explain his answer. You ask him for a fact about Mr. Webb's capabilities at that particular moment.

Mr. DARLINGTON: Then you and I differ about what I am asking him about.

Mr. JOHNSON: Well, I object to the question on the ground that it calls for a matter manifestly not within the knowledge of the witness, but for his guess or speculation as to what capacity Mr. Webb had at 6 o'clock on the evening of the 30th of September.

Mr. PERRY: I object to it on the ground that it is absolutely irrelevant.

The question was read by the examiner as follows:

"Q. You state you know of nothing either of them could have done to prevent your acquisition of the tax title. Do you know of any reason why, with this warning, Mr. Webb could not have communicated with Mr. Wiltsie, or could not have gone on to see him as well as you could, to protect the title of his client?" A. That, of course, I should say was a matter entirely within Mr. Webb's own discretion.

679 Q. And by your answer then you do not mean to say that you had any exclusive power of trying to seek this title? A. No, sir.

Q. Your answer reads that way, and that is why I am asking these questions.

Mr. JOHNSON: I object to that comment. I do not think the answer reads that way.

A. I don't understand it reads that way.

Q. Then what other explanation can you give of this express language, that you know of nothing either of them could have done to prevent your acquiring that tax title? A. I meant as a physical fact that I do not know whether Mr. Webb had the money to go to Rochester, or whether he could have gotten there ahead of me or not, if he had started to go.

Q. It was a little late in the evening to acquire funds to go to Rochester with? A. Possibly; but that of course I don't know. I say that I don't know of anything either of them could have done to prevent me from acquiring it, and as I say the courts being closed, and I in pursuance of a lawful right, I don't see how I could be interfered with or stopped from doing what I had set out to do.

Q. What do you mean by the courts being closed? A. I mean to say the hour when the court building closed had passed, and Mr. Webb, if he wanted to stop me by an injunction or writ of

680 *ne exeat* or something of that kind, would have had to go to the residence of a judge, and the residence of the clerk, if I was doing anything that was not right or that he wanted to prevent me from doing by some legal step.

Q. You had, yourself, determined to buy this tax certificate some hours prior to that, had you not? A. I should not say some hours.

Q. Have you not said so? A. I don't think so. Some hours prior to 6 o'clock?

Q. Yes. A. As it was between 3 and 4 o'clock that I saw the Messrs. Kann, and had not yet then absolutely decided to buy it, and as this conversation was at 6, I should hardly put it in the plural.

Q. Do you mean to say, Mr. Cohen, that you had not decided to buy this tax title before you saw Mr. Webb? A. Oh, no, sir. I only object to that part of the question when you ask if I had not decided upon it some hours before.

Q. When had you decided upon it? A. About 5 o'clock, or just before.

Q. Did you consider that calling on Mr. Webb for the purpose of informing him that you were going to Rochester after this tax title, doing so at 6 o'clock in the evening, after the banks and courts were closed, as you say, would relieve you of suspicion of unfairness or of doing anything tricky? A. Decidedly.

Q. You state you took the train to New York instead of going directly to Rochester, because you could not get a through
681 sleeper to Rochester? A. Yes, sir.

Q. Did you sleep well on that journey? A. I was somewhat disturbed in my slumber.

Q. Do you mind telling us from what cause? A. I was somewhat excited over the project I had in hand, and besides that I am not a very sound sleeper on railroad trains.

Q. Do you remember the conversation you had with me on the evening of October 30? A. Yes.

Q. Do you remember telling me something about your inability to sleep that night on your way to Rochester? A. I believe I did, sir.

Q. Now, please tell us as nearly as you remember what you said on that subject on that occasion?

Mr. PERRY: Mr. Perry renews his objection to all of this matter as being in his opinion entirely irrelevant to the matters at issue.

Mr. DARLINGTON: I hope Mr. Perry has no objection to my proving that this tax title is invalid if I can.

Mr. PERRY: Oh, no. I do not see anything relevant in any aspect of that evidence.

Mr. JOHNSON: I will ask if its validity is in any respect dependent on Mr. Cohen's somnolence.

Mr. DARLINGTON: I will wait for my answer before I engage in conversation with counsel.

A. I would like to have that question read again. I have forgotten what it was.

682 The question was read by the examiner as follows:

"Q. Now, please tell us as nearly as you remember, what you said on that subject on that occasion?" A. As I think I stated in my answer, Mr. Darlington, I might have used the word "pro-

priety" in connection with the purchase of this tax title, to you; but I am not certain. I rather think that I said to you I doubted whether I was doing the right thing in buying this tax title, as I felt that it was a leap in the dark. I had no definite idea of its use, and so forth.

Q. Did that keep you awake? A. I have said before that I was somewhat excited by the project I had in mind, and that I do not sleep soundly on railroad trains. I think those two things possibly may have disturbed my slumbers.

Q. Did you or did you not tell me on this occasion that your doubts, whether of the propriety or of the expediency of the transaction, kept you from sleeping? A. As I said before, it is possible I might have used some such expression.

Q. You were only venturing $500 in this matter were you not, Mr. Cohen? A. I did not know that when I started.

Q. That is all you had taken with you, was it not? A. Yes, but it was easy to get more.

Q. And you told Mr. Webb at your interview at 6 o'clock that the very least that could happen would be that Harry King would have to pay you back your expenses and outlays, and something
683 for your trouble? A. I don't remember telling Mr. Webb that, sir.

Q. Are you able to say you did not tell him that? A. I am reasonably sure that I did not tell him that at that time.

Q. Did you tell him so at any other time? A. I think it is possible that on the 8th day of October, when I had this talk with him to which I have heretofore testified I might have used some such expression as that with relation to Mr. Tobriner's having called to see me, and I think that possibly was the time that I used some such expression.

Q. Did you not tell Mr. Kann on September 30th, that these tax certificates were negotiable, good in the hands of any one that held them? A. I think I did, sir.

Q. Then knowing that fact, how were you concerned or uneasy about this investment you were going to make, and to such an extent as to keep you awake? A. I don't admit that I was so concerned that I kept awake, or uneasy.

Q. Have you any other explanation to make of what you say you probably told me on that evening? A. None beyond what I have already said.

Q. When, Mr. Cohen, did you obtain the correspondence between Mr. Wiltsie and Mr. Harry King which you have filed with your answer? A. I think I got that somewhere around the 10th to the 12th of October, but I am not certain. I can fix that date if you want to know definitely.

684 Q. Did you not have it on the 8th, at the time of your interview with Mr. Webb? A. I did not have it, but I knew of its existence at that time.

Q. At your interview with Mr. Wiltsie, did he or not tell you that

it was his rule not to sell his tax certificates, except to owners, mortgagees, tenants, or some one having some interest in the property? A. He did not.

Q. He did not explain to you his inquiry whether or not you were an owner or mortgagee or tenant, or ask what your relation with the property was? A. No, sir.

Q. You say you concluded to offer him $500 for this property, so as to make an offer that would bring the sale at once. Why did you think $500 would buy this property? A. Well, I didn't know.

Q. I quote from your testimony here at page 152–3, that you concluded to make an offer that would bring the sale at once, and offered $500. A. I had Mr. Ridout's opinion given to me the night before as to the character of man that Wiitsie was, and when he told me that he had asked about $300 for it and refused to name any figure to me as to what he wanted, but insisted upon my making an offer, I thought I would have to make him a generous one, so I went to the extent of the amount of cash I had with me.

Q. You considered that a generous offer, and that it would
685 probably bring acceptance, did you? A. Yes, sir.

Q. Although you say in your answer that you knew the property was worth many thousands of dollars, and that the president of the title company told you the tax sale was valid and would give a good title? A. Yes sir.

Q. You further state that you paid Mr. Wiltsie by check, making a deposit for the purpose, because you wished the transaction to be one of record. Why was that? A. Because I follow the general business rule in transactions, to have, when money is transferred, some voucher or receipt.

Q. Would it not have been simpler to have a receipt? A. Well, it was really a question of time, Mr. Darlington, then. Miss Watson did not want to take the money from me until after she had delivered the certificate, and I did not want to be delayed in getting back to Washington.

Q. And did it take less time to prepare a receipt which she could sign in a moment than to go to a bank and make a deposit, and then check against it? A. There was possibly another reason, and that was that maybe I didn't want to carry that money around with me. It was not in large bills, and was quite bulky. I think that possibly occurred to me at the time.

Q. And was that your reason, or the wish to make the transaction one of record? A. I think the main reason was the desire to have it of record, and there was also this subsidiary reason which I have stated, and that it was more convenient to do it this way. I
686 had plenty of time to go to the trust company and make the deposit, and have the check certified. It was drawn to my own order, and if anything happened to prevent the thing from going through, why I had a certified check of the trust company, which was as good as cash.

Q. And you had no special reason to make the transaction one of record? A. No especial reason, no sir.

Q. When you said at our last meeting that you did this because you wanted the transaction one of record, that was an inadvertence? A. Not at all, sir. You asked me if I had a special reason for wishing to make it one of record. I say no, but the general reason remains that I did wish it to be one of record.

Q. You state that you arrived in Washington on October 3, and that you got your tax deed made that day and recorded that day, because you thought it advisable to have it done promptly. Why was this? A. I had not forgotten that Mr. Webb had told me on the 30th of September that the rent was to be returned to the Kings, and I took it for granted that as soon as this rent was returned the Kings would be very anxious to take up the certificate, and so forth. I felt that if the matter remained in the collector of taxes office the usual length of time, a week or ten days, that possibly I might be stopped by an injunction, or something. I didn't know what. And I wanted to have the matter done promptly.

Q. You knew, before you went to Rochester, that the tax
687 sale had become irredeemable, did you not? A. Yes, sir; but there might have been a bill filed to restrain the Commissioners from issuing the tax deed nevertheless, upon some showing. I couldn't tell what.

Q. That was the object in getting it through quickly? A. That is all, sir.

Q. Now, having gotten your tax certificate and your tax deed, and gotten them recorded, all for the purpose as you state, of having a club that you could use over the head of Mrs. Kennedy or Mrs. King, did you find any occasion to make use of that club as against either of them, and if so, when? A. The first use that came to me in connection with that was when Mr. Tobriner called on me the next day.

Q. Did you find any use for your club on that day? If so, what? A. Mr. Tobriner I thought regarded it as a club by the manner of his conversation with me.

Q. You were proposing to sell it to him on that day, were you not? A. I asked him to make an offer.

Q. Did you make him any promise if he would make you an offer. A. That I would consider it.

Q. Meaning what? A. Just what I said.

Q. What did you mean by that, Mr. Cohen? A. Just exactly what the words mean, Mr. Darlington.

Q. Please give us your interpretation of them, and in the
688 sense in which you used them?

Mr. JOHNSON: Of the word "consider"?

Mr. DARLINGTON: Yes.

A. When Mr. Tobriner made me an offer, I would consider whether I would accept it or not.

Q. You had bought that certificate for the purpose of forcing the Kings out, had you not? A. No, sir.

Q. Had you not? A. Not directly.

Q. Have you not testified you bought it as a means of getting the property for the Kanns? A. For that purpose; yes, sir.

Q. Now, you were going to consider a proposition to sell it to Mr. Tobriner? A. I said I would consider it.

Q. Did you mean you would take into contemplation the actual fact of selling it to him, with a view of doing it? A. Possibly.

Q. Under what possibilities? A. Maybe a sufficient offer. I had no clear idea as to what use I would make of it, as I told you before.

Q. No, you told us that on September 30th you remembered that Mrs. Kennedy, after having signed an agreement had been induced by the Kings to recede from it, and that you bought this as a club to hold over her head, so that if they tried to dissuade her again you could prevent it? A. Yes, sir.

689 Q. That was on September 30th? A. Yes, sir.

Q. Do we understand that on October 4, you had it in mind to relinquish that club for a consideration? A. I was not certain just exactly what use I would make of it. The Kings and I had had previous negotiations, shall I call them, concerning their leasehold.

Q. Do I understand, Mr. Cohen, that when you told Mr. Tobriner you would consider an offer for this tax deed, you really meant you had it in mind to sell it to him? A. Well, hardly that Mr. Darlington. I rather expected that Mr. Tobriner would make some sort of a proposition to me with regard to the leasehold.

Q. What you really meant was to have him make some offer to you with a view to having it work around to the Kings' selling the lease. Was that it? A. Well, I could hardly answer that question in the affirmative, because I knew that the lease had been declared forfeited, or had been advised that it would be.

Q. Well, did you not make a proposition to him that you would pay a considerable sum of money and leave it on the table for them for the lease? A. No, sir; not at that time.

Q. Did you after that? A. I have stated that after that, to-wit, about the 29th of October, if I recall the date correctly, in answer to a question which he presented to me at the first interview I had with him at his office about the 15th of October——

690 Q. The lease was not any less forfeited on the 29th of October than it was on the 4th, was it? A. No.

Q. You renewed this subject of an offer by Mr. Tobriner for the tax title about October 15th, I think you said. A. I think so, sir.

Q. Was that with a view of selling it to him? A. That was with a view of avoiding litigation, if possible.

Q. By selling the tax title to him? A. By having him dispose of his lease to us.

Q. But you did not ask him that? You asked him for a propo-

sition to buy a tax title, did you not? A. No, I did not ask him for a proposition to buy the tax title. I told him I had not heard from him in regard to his last talk with me, and that I had been expecting a proposition from him, or something to that effect.

Q. The fact is, Mr. Cohen, is it not, that all the time you had no idea of selling the tax title, but simply of bringing about a compromise by which they would sell out their lease? A. I would have liked to do that.

Q. That was really the thing you had in mind, was it not? A. I think so, sir.

691 Q. At an interview between us on October 30th, did I not suggest that the theory of a disclosure by you to Webb of your intention to buy the tax title at arms' length would place Mr. Webb in the unfortunate position of standing by while an adverse claim to his client's property was being purchased, and did you not reply that you had no wish to put Mr. Webb in any unfortunate position, and that you thought if they, the Kanns, took a lease from Mrs. Kennedy her title would not be affected? A. I assured you that there was no agreement between Mr. Webb and myself except the conversation as to leasing the premises, and that I thought when that was done, Mrs. Kennedy's title would not be affected.

By Mr. DARLINGTON:

Q. You say that you told Mr. Tobriner on October 4, that you had been trying for years to get the King lease; is that correct? I mean have you so testified? A. I think I did sir.

Q. Please detail your efforts for years to get this lease, what you did, and with whom? A. I think I had a conversation with Mr. Harry King in his place of business on 7th street.

Q. Now, Mr. Cohen, I would rather you would not tell us what you think. I would like you to tell us what you know. A. Well, I had a conversation with Mr. Harry King in his place of business. I cannot fix the exact date. I told him that I wished to pur-

692 chase the lease which they held of the premises on Market space for the Kanns, and I offered him a large sum of money for it.

Q. What sum? A. $15,000.

Q. When was this? A. I stated that I could not fix the date, Mr. Darlington.

Q. Get it as nearly as you can. A. In the month of July or August, but in what year I can't say. I think it was 1899, but I am not sure.

Q. Who was present? A. I don't think any one else was present, Mr. Darlington.

Q. Now tell us what other efforts you made to get the lease. I will ask you there, have you stated all that took place at that interview? A. He refused the offer, saying that he might consider $50,000. I told him that I was not buying the property, and he went on to tell me about the facts from which he claimed that they

were doing a good business and that a living was made for one of the family, I think he said, out of the store, and under the circumstances he would not feel justified in selling it; that if he could get $50,000 which would bring them $3,000 a year, I think he said, income as an investment for his mother he would feel inclined to do it. Of course I treated that amount as making it an impossibility.

Q. Now please proceed to your next effort. A. My next recollection of any interview with Mr. King took place in my office
693 and was either in April or May, 1901. He came in to see me on some other business. I then took up the question of the purchase of the lease again with him. I told him that this might be the last time that I would ask him to sell the lease; and when he said his views had not changed about it in any way I asked him whether or not he would rent the two upper floors of the building to Mr. Kann, to which he replied "Yes, for $10,000 a year."

Q. Who was present at this interview? A. I think Mr. Adolph Wolf was in the office at the time, but I am not certain about that. I think so.

Q. Now proceed to your next effort. A. I don't recall any more, sir.

Q. These two interviews are what you refer to as your trying for years to get the lease, are they? A. I made another effort to buy the property from Mrs. Kennedy through Mr. Clarence Brandenburg, who was spending the summer at Eagles's Mere, Pennsylvania, where Mrs. Kennedy was.

Q. But that was not an effort to get the King lease, was it? A. It was in that same direction.

Q. At your second interview with Mr. King did you offer him any sum? A. I think not.

Q. At page 157 of your testimony at our last meeting, you say you offered King a large amount in previous years. Do you refer to this one offer in some July or August of some unnamed year?
A. Yes, sir; and to the fact that other efforts had *had* been
694 made by the Kanns themselves who, I believe, had also made an offer to Mr. King.

Q. You said, Mr. Cohen, that you had offered Mr. King a large amount of money for the lease in previous years? A. May I see that?

Q. Certainly; it is a little below the middle of the page, page 157. A. Yes, that is what I had in mind, sir.

Q. One offer in one previous year was what you meant, was it? A. No; that and the offer I had made Mr. King in my office, which I call an offer, when I asked him how he felt about disposing of the lease and how much he wanted for it.

Q. At that interview I believe you say you made him no offer at all. Am I correct? A. You are correct, sir, because he said he still wanted the same figure.

Q. On what business was it that Mr. King was in your office at that time? A. I don't remember.

Q. Do you not think you could remember by a little effort on your part? A. I don't recall, Mr. Darlington.

Q. How is it you cannot remember the business that was actually transacted and can remember the thing that did not result in any business? A. Because that was the thing I was interested in most, because I think his coming in was on some formal matter. It may have been the payment of a note for life insurance. I am not sure.

695 Q. How do you know he came in on business if you cannot remember the business? A. I was speaking from my recollection.

Q. Can you recollect? A. Nothing more than I have stated.

Q. Let me remind you that you have not yet recollected any business he came in on. A. I say it may have been in regard to the payment of some life insurance note.

Q. What was the occasion of your calling on Mr. Webb on October 8th? A. I wanted to tell him about the fact that Mr. Tobriner had been to see me with regard to the tax title and that I had told him to make an offer. I called on him in a general way and there was no special occasion for it.

Q. In what way did you consider Mr. Webb interested in that information? A. I can't say that I considered him specially interested in that information.

Q. Now, returning to my question asked some time ago, when, if ever, did a time come at which you had occasion to use what you have called a club which you had obtained through this tax title over either Mrs. Kennedy or Mrs. King? A. When I became aware of the fact that Mr. Webb was making proposals for a new lease with the Kings, which he told me on the 8th, and in effect that he did not feel bound by what I considered to be an agreement to lease to the Kanns, I then felt it was a proper time to have advice as to the benefit that the acquisition of this tax deed was to my client.

696 Q. That does not quite answer my question. A. In what respect, Mr. Darlington?

Q. Question repeated.

(The question was read by the stenographer.)

Mr. JOHNSON: Now read the answer which is not considered an answer.

(The examiner read the answer of the witness.)

A. That, I think, is an answer to your question.

By Mr. DARLINGTON:

Q. Do you mean at that time you found occasion to use this club? A. If you called Mr. Johnson's offer of compromise a club.

Q. I have not called anything, Mr. Cohen. I have asked you to tell us at what time you found occasion to use what you yourself describe as a club which you had obtained to hold over the head of

Mrs. Kennedy and you have answered by referring me to this time when you consulted Mr. Johnson. A. I don't think I can answer the question any more fully than I have.

Q. Had you and Mrs. Kennedy had any controversy about the tax title up to that time? A. No, sir.

Q. Why were you offering to compromise a thing that there had been no controversy over? A. Mr. Johnson had legal reasons for that, I presume.

Q. You know of no reason? A. When I consulted Mr. Johnson I committed the matter to his hands and followed his advice.

Q. Please answer my question, which is whether you knew
697 of any reason for suggesting a compromise at a time when no controversy had arisen over the tax title. A. The only reason that I could see was the fact that the Kings were negotiating for a new lease and the Kanns wanted possession.

Q. That is, from Mr. Webb's statement to you on the 8th you found the very thing was taking place which you have said you anticipated might take place on September 30th, namely, that the Kings were dissuading Mrs. Kennedy from enforcing the forfeiture. Is that right? A. It would appear so.

Q. To prevent her from doing that you had recourse to what you call the offer of compromise, namely, giving her notice that unless she ousted the Kings and gave you a lease you would enforce the tax title against her. Is that correct? A. No, I don't think that is stating it exactly correct, Mr. Darlington.

Q. Please point out the inaccuracy. A. And as to what was done I can only say and repeat that with the situation as it stood Mr. Johnson's advice in the matter was taken and followed.

Q. Now, Mr. Cohen, have you not testified at our last session that at a meeting between you and the Kanns and Mr. Johnson you authorized him to make this very offer which he made on the 9th?

Mr. JOHNSON: Who authorized him?

Mr. DARLINGTON: I think Mr. Cohen probably understands the question. Just read it.

698 (The examiner read the question.)

A. When you say "you" you mean the Kanns, of course, Mr. Darlington?

Q. I mean you and the Kanns. A. No, the Kanns authorized that offer.

Q. You were present? A. Yes, sir.

Q. In what capacity? A. As counsel.

Q. So that this thing you are now putting off on Mr. Johnson was something that your clients had directly authorized him to do on the very day that he did it and before he did it. Is that correct? A. The suggestion was made by Mr. Johnson that it should be done and was acquiesced in and permitted to be done by the Kanns.

Q. So that this offer of compromise, as you describe it was not something that Mr. Johnson did of his own volition or motion, but

something which he had been authorized to do by your client in your presence before he went to do it. Is that true? A. He had been authorized to do it in my presence by the Kanns in view of his own suggestion that it was the best step, in his judgment, to take at that time.

Q. So what you call an offer of compromise was simply a statement to Mrs. Kennedy through Mr. Webb that if she persevered in this proposition of making a lease to the Kings you would attempt to assert the tax title and enforce it against her? A. That was not the statement I made, Mr. Darlington.

699 Q. In what respect is it not the statement you made?

Mr. JOHNSON: I object. Let the witness state what was the proposition made to Mr. Webb and not differentiate between the proposition that was made and the characterization of it made by counsel.

A. Mr. Johnson told Mr. Webb that the Kanns owned the tax title; that he represented them in the matter and that he came to Mr. Webb with an offer of compromise to the effect that if Mrs. Kennedy would deliver possession under a long lease for $300 and the payment of taxes the Kanns would release the tax title, but that if she did not, and litigation ensued, the Kanns might insist on their full legal rights.

Q. Might do so? A. No, I think he said the Kanns would do so in all probability, or to the effect that the Kanns need not show Mrs. Kennedy any mercy. He also said that in the event of an ejectment suit, all that needed to be done on the part of the Kanns was to put the deed under the statute in evidence and that the burden would be upon Mrs. Kennedy.

Q. Was this a part of the offer of compromise? A. This was a part of the statement made by Mr. Johnson which I omitted to state at the last hearing.

Q. No, I think you told us at the last session that Mr. Johnson stated he considered the tax title valid. Am I right about that? A. And Mr. Johnson also stated that to contest the tax title would mean litigation and expense and time.

Q. Did he or not say to Mr. Webb on that occasion that if she rejected this proposition of compromise and litigation ensued,

700 the Kanns would defend their tax title, and, if necessary, enforce the same? A. I think so; yes, sir.

Q. You have said in your answer, at page 46 of the printed record, that Dr. Fry "merely expressed his own views which were that his patient was liable to be seriously affected in her health if litigation should ensue and that he wished to avoid litigation in the premises," and, at page 47, "that Dr. Fry further said that he was merely the friend and physician of Mrs. Kennedy and his intervention in the matter was solely in the interest of her health and to relieve her from the distress and anxiety of litigation of any sort with any person whomsoever." Did Dr. Fry make those statements?

A. Now, Mr. Darlington, the last part of your question is a quotation wherein I say "Further answering said paragraph, this defendant states that he is advised that * * * his intervention in the matter was solely in the interest of her health and to relieve her from the distress and anxiety of litigation of any sort with any person whomsoever." The other part of the question, the first part, is the statement that he made.

Q. So that Dr. Fry did tell you that he believed Mrs. Kennedy would be liable to be seriously affected in her health if litigation should ensue and he wished to avoid it; and you learned from some source that he had said that his intervention was solely in the interest of her health and to relieve her from the distress and anxiety of litigation of any sort with any persons whomsoever. Is that
701 correct? A. Yes, sir.

Q. On page 47 you state in your answer: "Said Dr. Frye was then informed that litigation was inevitable because if the said Mrs. Kennedy did not compromise the tax title with the defendant Cohen, litigation would ensue thereon through which she might lose her entire estate, and that in order to effect the compromise with said Cohen it was necessary to enforce a forfeiture of the lease of the complainant." That is true, is it? A. Yes, sir.

Q. You knew Mrs. Kennedy? A. Yes, sir.

Q. You knew she was a very old lady in frail health? A. Yes, sir.

Q. And that her physician thought this litigation would be dangerous to her life and health? A. Which litigation?

Q. Litigation over this tax title, this tax sale, this forfeiture. A. Not necessarily that litigation.

Q. That litigation would do so? A. Dr. Fry said his patient was liable to be seriously affected in her health if litigation should ensue.

Q. Any litigation? A. If litigation should ensue.

Q. And with that knowledge you informed him that litigation was inevitable? A. Mr. Johnson so informed him.

702 A. Because unless she made a lease to the Kanns litigation would ensue and she would be liable to lose her entire estate. A. Mr. Johnson made the statement as set out in that paragraph, Mr. Darlington.

Q. By whose authority? A. I presume on the authority of his clients.

Q. Don't you know? A. I think so, sir.

Q. Now I want to read you from your answer to paragraph 14 of the bill on page 47: "Answering the 14th paragraph of said bill, this defendant says on information and belief that the averment of facts therein contained to the effect that the defendant Marianne A. B. Kennedy, under the pressure and menace thus brought to bear on her, instituted a landlord and tenant proceeding against the complainant for the possession of said premises, is false; that neither this defendant nor the defendants Kann, nor any one representing

any one of them, ever approached Mrs. Kennedy or communicated with her in any way, or threatened her or menaced her in any manner whatsoever." Is that correct? A. I believe so.

Q. Are you able to reconcile that with your preceding answer? A. Which answer?

Q. The one in which you say she was told by Mr. Johnson with your knowledge and with the authority——

Mr. JOHNSON: He has not said she was told anything.

703 Mr. DARLINGTON: That Dr. Fry was informed?

A. Oh, that is a different matter.

Q. That Dr. Fry was informed by Mr. Johnson in your presence and by the authority of your clients that unless she made a lease to the Kanns, litigation was inevitable in which she might lose her entire estate. Can you reconcile that with your statement that neither you nor the defendants Kann, nor any one representing any one of them, ever approached Mrs. Kennedy or communicated with her in any way, or threatened her or menaced her in any manner whatsoever." A. That was a statement made to Dr. Fry, was it not, Mr. Darlington?

Q. Did you not understand Dr. Fry was Mrs. Kennedy's friend and adviser? A. He expressly disclaimed in any way, I believe, being her counsel.

Q. Why were you telling him what would happen to Mrs. Kennedy if she did not give your clients a lease? A. Because Dr. Fry seemed to have misunderstood the situation.

Q. Did you not tell Mr. Webb, whom you knew to be Mrs. Kennedy's attorney, on October 9, that unless she insisted on this forfeiture and made a lease to the Kanns and gave them possession the tax title would be asserted and she might lose her property? A. Where are you reading from?

Q. I am not reading now. A. I thought you were reading because that question did not sound like what the answer said, so I would like to have it read again.

704 The question was read by the examiner as follows:—

Q. Did you not tell Mr. Webb, whom you knew to be Mrs. Kennedy's attorney, on October 9, that unless she insisted on this forfeiture and made a lease to the Kanns and gave them possession the tax title would be asserted and she might lose her property? A. No, sir; Mr. Webb was made the offer of compromise which I have heretofore and several times repeated.

Q. And was not what you call an offer of compromise the statement that if the forfeiture was not insisted upon and the possession given to the Kanns they would assert tax title and enforce it?

Mr. JOHNSON: I object to that question as it is the third time that *by* counsel, by his question, has undertaken to represent that I, in that offer to Mr. Webb, made any reference to the forfeiture.

A. I was about to answer the question in the same way, Mr. Darlington.

Mr. DARLINGTON: I prefer to have Mr. Cohen answer the question instead of Mr. Johnson.

A. I was about to answer the question to the same effect.

By Mr. DARLINGTON:

Q. What is that? A. In regard to the enforcement of the forfeiture about which you have asked.

Q. What do you mean by that, Mr. Cohen? A. At the time that the offer of compromise was made to Mr. Webb by Mr. Johnson there was nothing, so far as I recall, said about the enforcement of any forfeiture.

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Q. How did you expect her to give your client a lease? A. I knew that she had decided to forfeit the lease.

Q. No, you said you had learned on the day preceding that she had decided not to do so, but to make a lease to the Kings.

Mr. JOHNSON: I object to that comment because the witness has not made any such statement at any time in the course of his testimony.

A. The matter of October 8th was with reference to a new lease, as I understood.

Q. Well, how does that help the matter any? A. And had nothing to do with the enforcing of the forfeiture of the old lease to which you refer.

Q. What had not? A. The question you ask. Nothing was said at the time that Mr. Johnson made the offer of compromise about enforcing the forfeiture.

Q. You learned on the 8th of October, you state, from Mr. Webb, that his client was contemplating an arrangement with the Kings under which they should continue in occupation and the Kanns would not get the property. Is that true?

Mr. JOHNSON: I object to that as not being a correct statement, as the witness' statement was that he knew there was a negotiation for a new lease.

(The question was read by the examiner.)

A. I should not consider that to be exactly a statement of what took place on the 8th of October.

Q. Mr. Cohen, I am not asking you questions in the phraseology you used, but is not that the substance of what you said?

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A. That they were to continue in possession?

A. Yes, that the Kings were to continue in possession? A. No, I did not say that, sir, at any time.

Q. Did you understand me to say that I am quoting those words, quoting your language? I am asking you if that is not the sub-

stance of what Mr. Webb told you? A. And what do you say was the substance of that?

Q. That Mrs. Kennedy was not going to lease to the Kanns, but was going to allow the Kings to continue occupancy of the property? A. Yes, sir.

Q. I thought so. A. That was the substance of it.

Q. Now, to prevent that, Mr. Johnson, by the authority of your client, went there on the 9th of October and stated in substance that unless she leased to the Kanns litigation would follow and the tax title would be enforced. Is not that true? A. I prefer to adhere to the statements which I have made in my affidavit and answer and which were that Mr. Johnson presented a proposition of compromise an offer of compromise.

Q. Do you know any advantage in a court of justice to be gained by adhering to a stated phrase or form of words? Does not my question state the substance of the interview, as you under-
707 stood it, in every material particular? A. I don't think it does, sir, and for that reason I did not want to answer it in that way.

Q. In what material particular does it differ? A. Let the examiner read the question again.

Q. Very well.

The examiner read the question as follows:

Q. Now, to prevent that, Mr. Johnson, by the authority of your client, went there on the 9th of October and stated in substance that unless she leased to the Kanns litigation would follow and the tax title would be enforced. Is not that true? A. No, sir; I don't think that is correct.

Q. In what substantial particular is it untrue? A. There was no threat of litigation made by Mr. Johnson.

Q. Let me read from your testimony at page 159 in which you say Mr. Johnson stated to Mr. Webb on that occasion that "if she rejected this offer of compromise and litigation ensued the Kanns would defend their tax title and, if necessary, enforce the same? A. Do you consider that to be a threat of litigation, Mr. Darlington?

Q. Do you? A. I don't think it was so intended, sir.

Q. Can you explain it in any other way? A. I think the litigation might have been begun by the other side.

Q. How would the Kanns enforce their tax title without
708 litigation? A. If the litigation were begun by the other side on the tax title and the tax title was held to be good, then the Kanns would enforce the same.

Q. Now let me read you from Mr. Webb's testimony on page 63 of that interview and ask you whether it correctly states the substance of the interview of October 9: "Mr. Johnson came to me and said, to the best of my recollection, that they had this adverse tax title, or that the Kanns had it, and that they proposed to hold it in

hostility to my client, Mrs. Kennedy; but that if she would dispossess the present tenants, under the lease, which they had forfeited, they would turn over this tax title to my client at no expense to her, and take the property at a rental of $300 a month." Is that substantially correct? A. I don't think that correctly expresses the statement Mr. Johnson made.

Q. Do you mean that is not the phraseology used or that there is some substantial difference in what took place? A. Let me look at that a moment. No; right here, Mr. Darlington, Mr. Webb states "but that if she would dispossess the present tenant, under the lease, which they had forfeited, they would turn over this tax title to my client at no expense to her." Nothing of that kind was said.

Q. You did not tell him that if she would put you in possession of the property you would release the tax title to her? A. We did not tell him that if she would "dispossess the present tenant
709 under the lease."

Q. Will you explain the difference between dispossessing the tenant under the lease and a lease to you? A. She had already given the tenant, as I understood it, notice to quit.

Q. Coming back to your interview with Mr. Tobriner of October 29th, according to your statement of the date, please tell us just what was said at that time about judgment by default and leaving some money on the table and the Ohio national bank? A. The Ohio National Bank reference was made at the interview on the 15th of October.

Q. What was that? A. My recollection is that at that first interview with Mr. Tobriner in his office on the 15th of October I spoke about the fact that I had not heard from him and that it would seem to me to be very much better if the parties could get together in some way, as I believe I told you earlier this evening, Mr. Darlington, and in that connnection the conversation went on and Mr. Tobriner made some reference to the Ohio national bank and how they could, in view of that pending litigation effect the lease, turn over the lease.

Q. What had that litigation to do with the lease? A. I believe that litigation had considerable to do with the lease.

Q. Just explain it, Mr. Cohen? A. The litigation brought by the Ohio national bank as shown by these amended bills and answers which were, I think, put in evidence earlier in the case, showed that the main thing in controversy on the part of the Ohio na-
710 tional bank was this leasehold which, it was claimed, had been transferred for no consideration and that it was a valuable asset, or something to that effect.

Q. The Ohio national bank, as a creditor of the Kings, was seeking to reach the lease as an asset of the estate. Was that it? A. I think so; yes.

Q. And that would embarrass and prevent any sale of the lease by Mrs. King. Is that the idea? A. I think so. Mr. Tobriner's question to me at that interview on the 15th of October was how, in

view of that litigation, the Kings could dispose of that lease, or something to that effect; and as I had told Mr. Tobriner at that time, the Kanns would still be willing to pay the Kings some money, not as much as had been previously offered.

Q. Did you tell him that? A. Yes, sir.

Q. How much did you tell him you would pay him? A. I don't remember that I stated any definite amount.

Q. If I understand you, Mr. Tobriner suggested as an obstacle to that arrangement that this Ohio National Bank suit would prevent that transfer of the lease? A. No, not as an obstacle to the arrangement—well, yes, call it an obstacle to the arrangement; that in view of that pending litigation, how could the Kings receive any benefit from the transfer of the lease, or something to that effect; and I took that question to Mr. Johnson as to his advice.

Q. I do not care to ask what took place between you
711 and Mr. Johnson, but I will ask you what took place between you and Mr. Tobriner on that subject? A. Following the interview with Mr. Tobriner on the 15th, when I saw Mr. Tobriner on the 29th I was prepared and did take up that feature of the case with him, and told him what I had been advised by Mr. Johnson could be done.

Q. Just tell us what you did tell him, what proposition you made to him, if any. A. I told him, in answer to the question that he had asked me at the last interview, that I had been told by Mr. Johnson that as the Kings had already forfeited their lease, they had been given notice to quit, that they could default under a landlord and tenant proceeding and for that default they could be paid a sum of money which could be put on Mr. Tobriner's table.

Q. I do not just see what putting it on Mr. Tobriner's table would have to do with the situation. What was meant by that? A. That he represented the Kings and that he could see that they got the money.

Q. Why not pay it to them direct? A. Well, at that time I was not considering dealing direct with them for evident reasons.

Q. What were they? A. I was dealing with Mr. Tobriner, their attorney.

Q. Just what was the significance of the suggestion to lay the money on the table? A. No significance as I understand beyond that the question of Mr. Tobriner was met, that they could be
712 paid in that way; that the Kings could be paid in that way in spite of that pending litigation.

Q. That if they were paid for allowing the lease to reach the Kanns by a default—— A. Not allowing the lease to reach the Kanns by default.

Q. Why not? Was not that the proposition? A. No.

Q. What was it? A. That the Kings could permit the landlord and tenant proceedings to go by default against them and for that default be paid.

Q. Was not the object of that to let the Kanns get the lease? A. Not at all; not that lease.

Q. Why were the Kanns paying anything to them to make a default if the object was not that the Kanns might get a lease of the property? A. The purpose of the Kanns was to obtain possession of the premises.

Q. Yes, by paying the Kings for making this default, was it not? A. Yes.

Q. Was it the idea that the creditors, if they had a case against the Kings at all, would lose it by that arrangement, although, if the money was paid to the Kings directly they could get it. Is that it?

A. Is that a conclusion of law, Mr. Darlington?

713 *A.* No; I am asking about your proposition. A. That was with Mr. Tobriner. If he chose to take that money and pay the Kings' creditors with it, he could do so.

Q. Have you not said you were proposing this arrangement as a means by which the Kings could get some benefit notwithstanding the suit of their creditors? A. In answer to Mr. Tobriner's proposition.

Q. This was then a project by which whatever money was paid might reach the Kings or the Kings might get some benefit from it instead of going to the creditors? A. It was in answer to the question asked by Mr. Tobriner.

Q. An answer to the question how the Kings could get any benefit? A. Yes, I think so.

Q. And the plain substance of it was a proposition that money was to be left on Mr. Tobriner's table for the Kings in order to get around the obstacle which this Ohio National Bank suit was supposed to create. Was that it? A. It was pointing out a way to a question that Mr. Tobriner asked.

Q. And that was the question, was it? A. I don't say that that was the question.

Q. If it was not, what was it? A. The question was as to how this matter could be brought about in view of this litigation over the lease.

Q. How what matter could be brought about? A. The Kings surrender the premises or avoid litigation or what not.

714 Q. How the Kings should receive some benefit for allowing the lease to be forfeited. Was that it? A. How the Kings could do anything concerning their lease in view of the pending litigation with the Ohio national bank.

Q Was it or was it not a question of how the Kings could derive a pecuniary benefit? A. I think that was the purpose of Mr. Tobriner's question.

Q. And that was the purpose of your answer, was it? A. Yes, sir.

Q. You stated in your answer that you were informed Mrs. Kennedy paid all the taxes through inadvertence and mistake prior to

the assignment to Mrs. King. By whom were you so informed? A. What page is that?

Q. Page 35, I think, but I am not reading from the page. A. By Mr. Webb.

Q. When? A. Some time before the preparation of this answer.

Q. How did that conversation come about? A. After the 9th of October and the day following, when Mr. Webb came to Mr. Johnson's office and informed him that the proposition of compromise was agreed to on behalf of Mrs. Kennedy I saw Mr. Webb frequently in Mr. Johnson's office and we talked about these matters.

Q. After that time you and he met frequently in Mr. Johnson's office with a view to make a defense in this controversy?

715 A. Well, I can't say it was with a view to making a defense to this controversy.

Q. What other object had you? A. We met frequently because the offer of compromise had been accepted.

Q. No other reason? A. No other reason.

Q. What further connection had Mr. Johnson with the matter if the offer of compromise had been accepted? A. When the matter was put in Mr. Johnson's hands——

Q. What matter? A. This entire matter.

Q. By whom? A. By me.

Q. What did Mr. Webb have to do with it? A. Not a thing.

Q. How did it happen that he was meeting there constantly with you about it? A. After the 9th of October?

Q. Yes. A. Because we were acting together.

Q. In what? A. In this offer of compromise. The parties had come together.

Q. What action were you taking? A. We were not taking any action that I know of.

Q. You were meeting there because you were acting together and yet not taking any action? A. We discussed the various situations.

716 Q. With what object? A. Because we were acting together under an agreement with counsel.

Q. What were you doing together? A. Talking with Mr. Johnson.

Q. Only talking? A. That is all, sir.

Q. No other action taken or contemplated? A. Pursuing the proposition of compromise.

Q. Just what were you doing, Mr. Cohen. That is what I want to get at. What were you and Mr. Webb doing that brought you to Mr. Johnson's office so frequently? A. Talking about the situation as it arose.

Mr. JOHNSON: May I ask what time you are referring to?

The WITNESS: After the 9th of October, as I understand.

Mr. DARLINGTON: Certainly; the time Mr. Cohen himself has fixed.

Mr. JOHNSON: Excuse me. I did not want to be impertinent, but I wanted to know whether it was before or after the institution of this suit?

Mr. DARLINGTON: Mr. Cohen is responsible for the time we are talking about. He says he and Mr. Webb frequently met at your office. I am trying to find out for what purpose.

Mr. JOHNSON: I am trying to find out what the inquiry is.

Mr. DARLINGTON: The inquiry is why he was meeting Mr. Webb at the time he was meeting him.

The WITNESS: I presume Mr. Darlington refers to the month of October or thereabouts.

717 By Mr. DARLINGTON:

Q. Yes. A. For no other purpose than the one I have stated.

Q. What is that? A. Pursuing the proposition of compromise.

Q. What pursuit were you making? A. Discussing the various situations as they arose.

Q. That is all the information you can give us as to the occasion of these visits? A. If I understood your question, that is all.

Q. That is the only explanation you can give of these frequent visits to Mr. Johnson's office and you and Mr. Webb meeting there? A. Yes, sir.

Q. At page 50 of the record you deny that Mrs. Dewey is the heir to all this property, premises No. 715 Market space. It is the latter part of paragraph 1 and 2. Who are the other heirs, if there are any others? A. I don't know. At this moment I don't recall.

Q. Are you not counsel for them? A. Yes, sir; I am of counsel in the matter.

Q. And you do not know who they are? A. I did not understand your question, I thought you meant in this case. I represent some of the Todds.

Q. Some of the Todds who are the heirs, as they claim, to this property? A. I do not understand that they are heirs to part of this property, Mr. Darlington. I understand that under the will of Mrs. Kennedy the property was left to Mr. Webb to sell and with that end in view the Todds would be entitled to a share
718 of the personalty if there should be a surplus after the payment of the legacies.

Q. And you represent some of them or all of them? A. Some of the Todds.

Q. And yet there is no agreement between your clients the Kanns, and your clients, the Todds, as to the use that is to be made of this tax title? A. Between whom?

Q. Between your clients, the Kanns, and your clients, the Todds? A. No, sir.

Q. You are representing the Kanns in the effort to enforce the tax title, and defeat the Webb and Todd interests and representing the Todds in their claim of some of the proceeds of the property when

Mr. Webb sells it. Is that true? A. Mr. Darlington, if you think that question is correct——

Q. If it is not correct I want to be corrected, Mr. Cohen. I understand you to say in your answer that there is no agreement or understanding that the tax title is to be held for any purpose except the exclusive benefit of the Kanns in any way they can enforce it? A. That is correct.

Q. Now if that is true that tax title may be used and unless Mr. Webb is able to give you a lease it will be used in opposition to the Kennedy or record title, and yet I understand you are the attorney for some of the very people who would be defeated by the
719 tax title? A. They understand that situation.

Q. I am asking you how those conflicting interests are to be reconciled, between the people who have the tax title and the people who have the record title. A. They understand the situation. They understand perfectly well that the offer of compromise made by the Kanns has been accepted by Mrs. Kennedy, has been concurred in by Mr. Webb, her executor, and that proposition of compromise does not involve the sacrifice of the property.

Q. But is not that proposition dependent on Mr. Webb's ability to defeat the Kings and give you possession, or is it so? A. I should say that proposition was now dependent upon the action of the court.

Q. What do you mean by that, Mr. Cohen? A. I mean to say that the entire controversy having come into court, that proposition is now before the court practically.

Q. Suppose the court sustains the Kings and relieves the forfeiture, where do your clients, the Todds, stand with respect to each other? A. Both clients understand my representation of the other, and neither of them objects to that.

Q. But that does not enlighten us any, Mr. Cohen. I want to know if as your answer clearly states, this offer of compromise which you say has been made and accepted is conditioned on the success of Mrs. Kennedy or Mr. Webb in giving possession of the property, and although they are trying to do it, if they fail in giving
720 possession to the Kanns, then the Kanns and yourself, who hold the tax title, both reserve the right to enforce it against the property. Is that right? A. I confess I do not understand the question.

The question was read by the examiner.

A. I do not understand that question, Mr. Darlington, I must repeat.

Q. I understand you to say that this offer of compromise is conditioned on Mrs. Kennedy or Mr. Webb getting possession of the property and putting you in possession. Is that right? A. The offer of compromise was not conditioned upon that. The offer of compromise was that they should do thus and so.

Q. What? A. I have stated that several times.

Q. Please state it again. A. Giving the Kanns possession under a lease and then the Kanns would release the tax title.

Q. Now my question is suppose as the result of this suit Mr. Webb is unable to give the Kanns possession, then what becomes of your tax title, what becomes of your agreement about the tax title. He is doing his best, but suppose he fails; what is the result of the tax title under your agreement? A. I don't know, Mr. Darlington, what you mean by Mr. Webb is doing his best.

Q. He is endeavoring to give you possession. He is insisting on the forfeiture. Now suppose the court relieves against the forfeiture and he is unable to give you possession, what is your agree-
721 ment with respect to this tax title as against Mr. Webb with those you represent? A. There is no agreement whatsoever of any kind beyond as stated in the offer of compromise.

Q. I do not want to get back into that offer of compromise again. I want to ask you what is the agreement or understanding between yourself and your clients the Kanns on the one hand and Mr. Webb and your clients the Todds on the other as to what use this tax title shall be put to if Mr. Webb proves unable to put the Kanns in possession, although he is doing his best to that end. A. There is no understanding.

Q. Then you propose to enforce the tax title against the property, do you? A. What we may do after the court declares the lease not to be forfeited is, I think, pretty clearly outlined by the offer of compromise.

Q. What is that? A. Enforce the tax title, I should say.

Q. To the destruction of the interests of your clients, the Todds? A. That, of course, is a matter, Mr. Darlington, where the course may be changed.

Q. What do you mean by that? A. I mean by that that if Mr. Webb is unable to carry out his offer of compromise, if Mr. Webb is declared by the court to be in the wrong in this transaction and that the lease shall not be forfeited, I am unable to say now what will be done with the tax title. I cannot forecast events.

722 Q. You are aware that there is a very great conflict of interests between your clients, the Kanns, and your clients, the Todds, in that contingency, are you not? A. I had not really considered that, Mr. Darlington, but both of them know the relation that I have to each of them.

Q. What information have you as to the time at which Mrs. King first learned of this tax sale? A. The information contained in the letter of Mr. Wiltsie in July, and the further fact that when I made an investigation at the tax office I found that she had paid a number of taxes in May, 1901, until I came across the 1899 failure.

Q. Your information is then that Mr. Wiltsie communicated the fact to her in July? A. Yes.

Q. And at the time she was paying certain taxes in 1901 this default existed? A. Yes.

Q. But I am asking what information had you as to the time

when she discovered it or learned of it. Have you any, other than the Wiltsie letter? A. I think not.

Q. You state in your answer at page 38 that you are informed she was not without knowledge of the tax sale until the latter part of July, 1901. What information had you to which you there refer?

A. I think Mr. Webb told me he believed she knew it before then.

Q. That she knew it, or he believed she knew it? A. He
723 believed she knew it. *A. He believed she knew it.*

Q. The statement of your answer is that you were informed she did know it? A. Where is that, Mr. Darlington?

Q. On page 38. "He is informed and believes that said averment is untrue." A. Now what is the question?

Q. The allegation of your answer is that you were informed that said averment was untrue, namely, that you did not discover it until the latter part of July, 1902. Did you mean only that Mr. Webb told you he believed he knew it? A. I want to fully understand your question before I answer it, and I do not understand it.

The last question was read by the examiner.

A. I think now that Mr. Webb said she did know it.

Q. Is your recollection pretty clear about that, Mr. Cohen? A. No; I can't say that it is perfectly clear, but that is my impression.

Q. Mr. Cohen, what was the object in taking this tax deed in your name instead of in the name of the Kanns? A. I wanted to control the situation myself.

Q. Why was that? A. Because of my previous experience with Mrs. Kennedy in the alley sale matter and because of my previous negotiations with the Kings.

Q. What do you mean by that? A. In the matter of the lease.

Q. What reason existed for taking it in your own name instead of the name of your clients, the Kanns, for whom you
724 were acting and who furnished the money? A. I took it in my name with their consent.

Q. I know that, but I ask you why you did it? A. As I stated, because I wished to control the situation, to be in a position to do what was necessary, manage it.

Q. You say you took it in your own name because of some previous experience with Mrs. Kennedy and Mrs. King. To what do you refer?

Mr. PERRY: Mr. Perry renews his objection on behalf of the executor of Mrs. Kennedy. I suppose this is the same matter that was referred to before. I object to it as absolutely irrelevant.

Mr. DARLINGTON: I agree it does not bind Mr. Webb or anyone he represents.

A. Because of Mrs. Kennedy's action at the time of the revocation of the alley agreement.

Q. Just tell us concisely and clearly what you mean. A. Mrs.

Kennedy, after signing an agreement to revoke the agreement (1891?)
made in 1901, was induced by the Kings to withdraw her signature and notified me she had withdrawn her signature; and I wished to hold this tax deed in my own name so that if there was any change of attitude on the part of any person I could make such use of it as I thought necessary and proper.

Q. You explained to us at our last meeting that because of that influence of the Kings over Mrs. Kennedy in the former transaction you concluded to get something you could use as a club over
725 their heads; but I am asking you now why you did not take the deed in the name of your client instead of your own? Why was it that being in your name would make it any more effective for the purpose than to take it in the name of the Kanns? A. I could control the negotiations with regard to it myself subject, of course, to their approval. I had their full confidence and they were perfectly satisfied to have it done.

Q. I am not questioning that at all. There is no other reason you can give? A. No.

The further examination of this witness and the further taking of these depositions was thereupon adjourned until Wednesday, November 18, 1903, at 8 o'clock p. m.

726 WASHINGTON, D. C.,
November 18th, 1903—8 o'clock p. m.

Met pursuant to adjournment at the office of Wolf & Cohen, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendant H. Randall Webb, Mr. Perry.

Present on behalf of the defendants Cohen and Kann, Mr. Johnson.

Whereupon the witness MYER COHEN resumed the stand and testified as follows:—

I wish to add to my testimony given last night concerning the relations existing between myself and my firm and Mr. Henry King, Jr. I find that I wrote his will in 1894, at the request of Mr. Simon Wolf, and that a fee of $5 was paid for that service. In addition to that, in 1893, Mr. King's last will and testament was written, but by whom I cannot say. I do not believe I had anything to do with it. For that service a fee of $20 was paid. I also find that in 1896 a release of a deed of trust was prepared and a fee of $5.50 for the release and notary fee was paid. In October, 1896, for the services rendered in the extension of the lease in question, about which I was asked last night, a fee of $5 was paid. With neither of
727 the last two transactions had I any connection, nor did I know anything about them until my attention was drawn to them by Mr. Adolph Wolf to-day, when I made an examination of the books.

Cross examination resumed.

By Mr. DARLINGTON:

Q. These services, Mr. Cohen, were performed by your firm? I mean the services to which you have referred to-night? A. They were performed individually, Mr. Darlington, by different members of the firm, as I have stated. Mr. Simon Wolf's relations and Mr. Henry King, Jr.'s relations were most intimate and friendly, and out of that friendship I believe arose these transactions.

Re direct examination.

By Mr. JOHNSON:

Q. Mr. Cohen, you were asked last night on cross examination to state what the matter of business was about which Mr. Harry King called to see you at your office in the spring of 1901. Have you since been able to determine what it was? A. Yes, sir.

Q. What was it? A. It was a claim which my firm had for collection against the estate of Henry King, Jr., amounting to some $40. It was sent us by a New York collection agency and Mr. Harry King came to my office and paid me 50 cents on the dollar for that claim, we transferring or assigning it to him or to
728 the firm of Caroline King and Sons, I don't remember which. That was the occasion of his coming to the office.

Q. What was the date? A. The 21st of May, 1901.

Q. I will ask you to state what other business your firm conducts than that of a law business. A. In addition to being members of the bar, we conduct a large fire and life insurance agency which was established by Mr. Simon Wolf in 1878. We also lend money for clients upon real estate and in some one or two instances have collected some small amounts of rents for properties which we had in charge.

Q. I will ask you to state whether or not your firm has done any business for either Mr. Henry King, Jr., or any of his sons in either of those branches of business. A. Yes, sir, a very large amount. We had for many years the fire insurance of Mr. Henry King, Jr., and we also had business in the life insurance branch with him. We also continued the loan about which I was asked last night on cross examination, where we represented the lender and Mr. King had become the owner of the property. Mr. King, I believe, also purchased a piece of property on 8th street between H and I, northwest, a dwelling-house, the rent of which was collected by Mr. Charles W. Handy, who was for years engaged in the real estate business and had a desk in our office. After Mr. Handy left, the collection of that particular rent was continued for some years by us for him.

Q. What was the amount of the rent? A. $42 and some cents per month.

729 Mr. PERRY: I want to enter an objection to this line of examination as irrelevant to the issue here.

Mr. DARLINGTON: I concur in that objection.

By Mr. JOHNSON:

Q. In the matter of this insurance, fire and life, who paid the compensation to your firm? A. The companies which we represented by way of a commission or brokerage to us.

Q. Do you know of any other business relations of your firm with Mr. King or his sons? A. No other business relations.

Q. I am speaking of business relations. A. No other business relations unless the matter of loaning Mr. King money at various times could be called a business relation, which was done as a matter of friendship as well as endorsing notes for him.

Q. In that do you refer to Mr. Henry King, Jr.? A. I refer to Mr. Henry King, Jr.

Re cross examination.

By Mr. DARLINGTON:

Q. Mr. Cohen, do I understand you loaned any money to Henry King, Jr. or to any one of the King family? A. Yes, sir.

Q. When and to which of them? A. Personally I loaned Mr. Henry King, Jr. sums of money during the summer of 1890 when Mr. Wolf was abroad.

Q. Whose money? A. The money of the firm of which I was a member.

730 Q. Any since 1890? A. Yes, many loans were made to Mr. King.

Q. By you? A. By the firm of which I was a member; by Mr. Wolf and sometimes by me, I believe.

Q. Did you ever endorse a note for the Kings? A. Yes, sir.

Q. When? A. Oh, numerous times.

Q. For what purpose? A. As a matter of accommodation.

Q. Did Mr. Henry King endorse for your firm? A. Never, sir.

Q. Did he lend money to your firm? A. No, sir.

Q. When was the last time you endorsed for him or loaned him money? A. My recollection is that in August, 1897, when Mr. Henry King, Jr., died, we were still endorsers on his paper to the extent of about $700, which amount of money Mr. Harry King paid to us in full within the year following.

Q. Were not those insurance notes? A. No, sir.

Q. Where are they? A. I suppose Mr. King must have them.

Q. Who was the holder of this $40 claim of which you have just spoken? A. I have the papers in the case here, Mr. Darlington. I don't remember the name. I will get them if you want them.

731 Q. I will be glad if you will do so. A. Myer Jonasson & Company.

MYER COHEN.

Subscribed and sworn to before me this 25th day of April, 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

732 HENRY RANDALL WEBB resumed the stand for further cross examination.

By Mr. DARLINGTON:

Q. Mr. Webb, you heard Mr. Cohen's statement last night that according to his recollection you were his informant that Mrs. King knew of this default in the tax prior to the latter part of July, 1901. Is his testimony correct in that particular? A. I think I did not inform Mr. Cohen anything about Mrs. King. The only thing I can think of is mentioning the fact that all the other taxes had been paid, that a prior sale had been redeemed in May, 1901, and I thought it highly probable that this sale had been discovered at that time.

Q. These taxes you spoke of as being paid, and tax sales redeemed, were the Henry King estate property, were they not? A. No; they were taxes paid on this property in controversy.

Q. You stated to Mr. Cohen that you thought it highly probable, in view of that fact—— A. That is the only thing I can think of.

Q. You have no information in contradiction of Mrs. King's statement in her bill that she did not know of it until the latter part of July? A. No; that is the only thing I can think of. When you refer to Mrs. King, I was refering more to Mr. Harry King.

Q. Have you any information that Mr. Harry King knew
733 of it prior to that time? A. Only what I have said.

Q. And that is a mere inference from the fact—— A. A mere inference; yes.

Q. Here is a matter I would not refer to except that it has been placed on the record for some purpose. That is an averment in Mr. Cohen's answer that Mrs. King's counsel intervened between you and your client and endeavored to have her act in opposition to your advice. I would be glad if you would state any facts that you know that bear out that charge. A. On the 26th day of October, Saturday, I received a telephonic communication from Mr. Johnson to the effect that Dr. Fry had telephoned him that he had had a conversation with Mr. Darlington, and told me to see Dr. Fry about it. I called up Dr. Fry in the afternoon when I knew he was in his office. Dr. Fry informed me that he had received a note from Mrs. Kennedy a couple of days before that in which she said that the prospect of litigation was worrying her very much and she was afraid it might have an effect upon her health. He said he had gone out to see what he could do about it; that he had met Mr. Darlington and Mr. Darlington had told him or advised him that the tax title was of no consequence and the best and easiest

thing for Mrs. Kennedy to do was to let the Kings remain as her tenants and fight the tax title. I called to see Mrs. Kennedy that afternoon and found that that opinion or advice of Mr. Darlington had been communicated to her and that she was very much impressed by it. On Tuesday, the 29th day of October, I met Mr. Cohen and Mr. Johnson at Dr. Fry's office and the situation
734 was discussed between us. Dr. Fry, as I recollect, stated at that time that he had had this talk with Mr. Darlington and Mr. Darlington had advised him or told him that the tax title was of little consequence and that the best and easiest thing for Mrs. Kennedy to do was to continue the Kings as her tenants and fight the tax title and that he had informed Mrs. Kennedy of this fact and advised her to do as Mr. Darlington had told her. I will add right there that during this conversation Mr. Darlington called to see Dr. Fry, as he informed me, on an entirely different matter. Later in the day, soon after I got back to my office after leaving Dr. Fry's, Mr. Darlington came to see me and informed me that my client was anxious and willing to receive this rent; that he could have paid it, but he did not do it because he wished to inform me first of the fact. I neglected to ask Mr. Darlington at the time who brought this message to him. Soon after he left my office I wrote, asking him to tell me who his informant was. I then went up to see Mrs. Kennedy.

Mr. JOHNSON: You wrote whom?

A. I wrote to Mr. Darlington, I say. I then went to see Mrs. Kennedy and asked her if she had sent this message to Mr. Darlington. She told me that she had not done so. I then went back to my office and found a letter from Mr. Darlington declining to tell me the name of the person who had given him this information.

By Mr. DARLINGTON:

Q. Have you that letter? A. Yes, sir.

735 Q. Will you kindly produce it? A. Yes; I will produce it. I wrote back to Mr. Darlington that the messenger, whoever he was, was unauthorized and that Mrs. Kennedy had made no such proposition. I told these facts to Mr. Cohen, or Mr. Cohen knew himself of them at the time, and I suppose that he drew his inference from these facts. Here is a copy of my letter to Mr. Darlington of November 29th, his answer to me and my answer to that letter.

Mr. DARLINGTON: I am quite willing that these may go into the record.

Mr. PERRY: I suppose they had better go in.

The papers referred to are filed herewith, marked Exhibit H. R. W. Nos. 22, 23, and 24, and are in the words and figures following, to wit:

EXHIBIT H. R. W. No. 22.

Nov. 18/03.

OCT. 29, 1901.

J. J. Darlington, Esq.

DEAR SIR: In your interview with me this morning, you stated, as I understand you, that it had been intimated to you last week, that my client Mrs. Kennedy would accept rent from Mrs. King and waive the forfeiture of the lease. As this is entirely contrary to my advice and the specific instructions from my client, I consider that I have the right to ask you from whom such intimation came; whether from my client or from any one else claiming to represent her. I have received no such intimation from my client and no modification of my instructions and you can readily
736 understand that I will be much embarrassed in discharging my duties to my client if communications to counsel of my adversary, at variance with my instructions and advice are made behind my back by my client or any one authorized to represent her.

I am sure you will recognize at once the correctness of my position and let me know at once from what source the instructions to which you referred came.

I am,

Very respectfully yours, H. RANDALL WEBB.

EXHIBIT H. R. W. No. 23.

Nov. 18/03.

J. J. Darlington, attorney at law.

OFFICE 412 5TH STREET N. W.,
WASHINGTON, D. C., *October 29th*, 1901.

DEAR MR. WEBB: Appreciating the view expressed in your letter and the very embarrassing circumstances to all of us which have grown out of the controversy over the King lease, I shall be very glad to do anything which I think I ought to do in the direction of your desires. You will, however, upon reflection, I am sure, agree with me that counsel for Mrs. King cannot assume the attitude of carrying information between the adverse parties and their counsel. As I stated to you this morning, I have never seen your client, nor have I sought in any manner to communicate with her except
737 through the letters which you have seen, and about which we early reached an agreement. Beyond this, I do not feel at liberty to make any statement, other than the fact that, as I stated to

you this morning, I have been informed that the controversy is extremely distasteful to Mrs. Kennedy, that she prefers no longer to be a party to it, and that she needs and would like to have payment of her rent.

Yours very truly, J. J. DARLINGTON.

W. C. S.

H. Randall Webb, Esq., city.

EXHIBIT H. R. W. No. 24.

Nov. 18/03.

OCT. 29, 1901.

DEAR MR. DARLINGTON: I have your letter of this morning in which you reiterate the statement that you have been informed that my client prefers to accept rent from Mrs. King and thus abandon the position she has taken under my advi[illegible] which I had maintained under her instructions. I have [illegible]s. Kennedy to day and she assures me that she has not a[illegible]d any one to make any such statement and that my instruc[illegible] and authority in the premises are unchanged. I regret that you do not recognize my
738 right to know the party who has assumed to speak for my client in the manner indicated, since it is a matter upon which I have every right to be informed.

Should any one assume to speak for Mrs. King and make any representations, as to her position, I should certainly feel bound to advise you, not only of the fact, but of the source of my information. I must again assure you that I am Mrs. Kennedy's counsel and authorized alone to speak for her and that the information you have received is wholly unauthorized,

Respectfully yours, H. RANDALL WEBB.

By Mr. DARLINGTON:

Q. Did Dr. Fry or any one else *to* tell you, Mr. Webb, that Mrs. King's counsel had endeavored to dissuade Mrs. Kennedy from following the advice of her own counsel? A. That is the only information I have in the matter,

Q. Please give a specific answer to this question. A. Nobody told me so in so many words; no.

Q. Did anybody tell you that Mrs. King's counsel had endeavored to have her condone the forfeiture to the complainants and release her from the consequences thereof in opposition to the advice of her own counsel. A. Nobody used that language to me; no.

Q. Did anybody use any equivalent language? A. No, sir.

Q. Recurring to Dr. Fry, did Dr. Fry tell you that Mr.
738a Darlington had sought him or that he had come to Mr. Darlington as his own counsel and asked him his opinion as to

the validity of this tax deed? A. Dr. Fry gave me to understand that he met Mr. Darlington accidentally in the street.

Q. Accidentally or at Mr. Darlington's office? A. In the street, I understood.

Q. Did he state that Mr. Darlington conferred with him, or that he asked Mr. Darlington's opinion as to the validity of this tax title? A. I don't think he made a statement about that, Mr. Darlington.

Q. You refer to some occasion when you were at Dr. Fry's house on which occasion Mr. Darlington entered while you were there? A. That was on the 29th day of October, 1901, the same day.

Q. Was that the occasion on which Mr. Johnson or Mr. Cohen or both of them told Dr. Fry, in your presence, that if Mrs. Kennedy would enforce the forfeiture and give them a lease they would surrender the tax title, but otherwise they would bring suit to enforce it? A. I think they used words to that effect, yes.

Q. You say some one told you that Mr. Darlington had called on other business. Who was that "some one"? A. I think it was Mr. Darlington himself.

Q. Did not Dr. Fry tell you or did you not inquire of Dr. Fry on that occasion whether I had come to see him about the matter and did he not tell you I was there to see him about a rail-
739 road damage suit in which he was a witness? A. I think he did.

Q. What led to this meeting of Mr. Cohen, Mr. Johnson and yourself at Dr. Fry's office on that morning, October 29? A. I don't remember very clearly. I think it was to go over the whole matter with Dr. Fry.

Q. At whose instance? A. I think it was at Dr. Fry's instance, although I am not certain.

Q. Do you think Dr. Fry requested you to come to his house with these gentlemen? A. That is my recollection.

Q. Was that by letter or otherwise? A. Verbally.

Q. Is your recollection at all distinct about that? A. No my recollection is not distinct.

Q. Did any of these gentlemen meet you there, or did you come together? A. We met together.

Q. By appointment? A. Yes.

Q. I wish you would, if you can, tell us by whose appointment. A. I requested Mr. Johnson to meet me up there at Dr. Fry's that morning as I wished to make an explanation that I did not know anything about this action on Dr. Fry's part until late Saturday afternoon, the 26th day of October.

Q. And it was on this same date, October 29th, was it,
740 that I told you I had learned that Mrs. Kennedy was desirous of having the rent? A. Yes, sir; you told me that. Yes, you told me, as near as I can recollect that she was willing and anxious to receive her rent and that you could have paid it but you did not do so until you had first spoken to me about it.

Mr. PERRY; Mr. Perry regards this whole matter as irrelevant, but as Mr. Webb is involved in it personally and professionally I think it proper to ask him a few questions with respect to those views of the case.

Mr. DARLINGTON: Just let me say I regard it as wholly irrelevant and I should not have referred to it except for the imputation upon counsel contained in this answer on page 47.

Redirect examination.

By Mr. PERRY:

Q. Mr. Webb, what was Mrs. Kennedy's first attitude with respect to the forfeiture of this lease? A. Her first attitude was to enforce the forfeiture of the lease and there was no change in her attitude to my knowledge until the 26th day of October, 1901.

Q. What happened on that day? A. That was the day that I received the telephonic message from Mr. Johnson and then called up Dr. Fry and spoke to him over the 'phone. Later on, I saw Mrs. Kennedy herself.

Q. What action did you take at or shortly subsequent to that time with respect to your professional status in the case? A.
741 During the conversation at Dr. Fry's house I told Dr. Fry I should most likely have to get out of the case.

Q. Why? A. Because there seemed to be a disposition to go directly contrary to my advice.

Q. State whether or not you communicated that to Mrs. Kennedy. What did you say to her in that connection? A. When I went to see Mrs. Kennedy later that day after having my talk with Mr. Darlington I told her that if she had sent such a message to Mr. Darlington of course I could no longer remain her counsel.

Q. What did she say? A. She asked me not to do that and assured me that she had not sent such a message.

Q. What was Mrs. Kennedy's attitude after that with respect to the Kings? A. She seemed to be very much changed and very anxious to get some sort of compromise of the whole case.

Q. What next ensued? A. The next thing that ensued was the offer of compromise made by me on the following day, the 30th day of October.

Q. You refer to the letter you wrote to Mr. Darlington and Mr. Tobriner, in evidence. A. Yes, sir.

Q. And what followed next after that? A. The next was the receipt of the letter from Messrs. Darlington and Tobriner of November 1st, 1901.

Q. Did you receive any suggestions from either Mr. Dar-
742 lington or Mr. Tobriner or from any one else in the interest of the Kings to the effect that $70,000 was too much? A. I did not.

Q. And that the bond ought to be reduced? A. I did not.

Q. What happened next? A. The next thing that happened was

a conversation I had at my office with Dr. Fry. I showed him the letter and told him——

Q. From whom? A. From Messrs. Darlington and Tobriner and told him that was the end of all negotiations between us. He read the letter over and did not seem to think the letter definitely refused that proposition. I told him I did not see how language could be more explicit, but if he wished to satisfy himself he could see Mr. Darlington, that I would not go to see him.

Q. What happened next? A. Dr. Fry went away and came back——

Mr. DARLINGTON: Let it be understood that I am not by my silence acquiescing that there is any probative force or any evidence in these repetitions of what took place between Mr. Webb and Dr. Fry.

Mr. PERRY: I agree to that. It is merely in justice to Mr. Webb professionally.

Mr. DARLINGTON: With that view I have no further objection.

A. Dr. Fry went away and came back and told me that they declined the proposition of compromise. That is Mr. Darling-
743 ton had done so.

Q. And thereupon? A. Thereupon he became satisfied that they would not accept.

Q. And what followed? A. The next thing I can remember was the signing of the landlord and tenant notice of complaint—that is, the suit for possession.

Q. Do you mean the complaint or do you mean the notice to quit? A. The notice to quit had been sent on the 4th of October.

Q. You mean the complaint, then? A. Yes.

Q. What led you to fix the sum of $70,000 for the proposed bond? A. I figured up that $3,600, which the Kanns offered to pay was 5 % of $72,000. I consequently settled on $70,000 for that reason.

Q. Was there any change in Mrs. Kennedy's attitude after that, after the notice to quit had been given and the complaint made? Was there any change in her attitude? A. No change that I know of.

Q. You have referred in your testimony to a choice between two evils. What litigation was threatened on one side? A. The litigation of the tax title which might result in the loss of Mrs. Kennedy's property, and if it was successful it simply meant the con-
744 tinuation of the lease which Mrs. Kennedy wished to get rid of.

Q. What litigation was threatened on the other? A. On the other hand, it was the effort to forfeit the lease to obtain gratis the outstanding tax title and to get a new lease with an increased rental of one-half.

Q. Who, in point of fact, began litigation against Mrs. Kennedy? A. Litigation was begun on the 4th day of December by Caroline King.

Recross examination.

By Mr. JOHNSON:

Q. Mr. Webb, in this printed record, page 19, there is a letter styled Exhibit C from Mrs. Kennedy to Mrs. King, dated October 1st. Following that, on page 20, there is a letter dated October 8, 1901, Exhibit B, from Messrs. Darlington and Tobriner, addressed to Mrs. Kennedy. Following that, on the same page, is Exhibit E, a letter dated October 10, from yourself to Messrs. Darlington and Tobriner. Following that, on page 21, is a letter styled Exhibit F, dated October 12, 1901, from Messrs. Darlington and Tobriner addressed to yourself. Following that, on page 22, is a letter, Exhibit G, dated October 14th, 1901, from yourself to Messrs. Darlington and Tobriner; and on the same page is a letter dated October 14th, 1901, to Messrs. Darlington and Tobriner from Mrs. Kennedy. I want to ask you to state whether or not before the answer of Mr. Cohen was filed in this case and before the bill was filed you
745 acquainted Mr. Cohen and myself with the letters to which I have just asked your attention? A. I did; yes.

Q. I want to ask you if it is not a fact that you suggested my going to Dr. Fry's office with Mr. Cohen on the morning you have stated we were there and I declined to do so except upon your express invitation and on your ascertaining that it would be agreeable to Dr. Fry? A. I did state that.

Q. Is that a fact? A. Yes, that is a fact.

Q. Do you know of my having seen Dr. Fry on any other occasion? A. Not that I know of, no.

Q. I think it appears here in evidence, both by the testimony of Mr. Tobriner and of yourself that Mr. Tobriner called to see you on the 4th of October. Is that correct? A. On the 3rd of October.

Q. I will ask you to state whether or not prior to the filing of this bill you acquainted Mr. Cohen and me with the fact that Mr. Tobriner had visited you on that occasion? A. I think I did; yes.

Q. State whether or not you informed us of the substance of your conversation with him? A. I think I did; yes.

Q. Now, Mr. Webb, is it not a fact that before this bill was filed, you complained to me that you considered Messrs. Darlington and Tobriner had not acted properly to you and that the change in Mrs. Kennedy's attitude, a disposition to disregard your advice, was
746 due to the action of those gentlemen? A. I don't remember that, Mr. Johnson.

Q. I am not speaking of those exact words, but did you not in substance say that. Did you not consider and so state that you considered you had a grievance against those gentlemen? A. I thought that they should have written that letter to me instead of to Mrs. Kennedy, and so stated.

Q. You were also interrogated about the matter of your examination of the tax record. I want to ask you if you recall having told

me, in Mr. Cohen's presence, substantially this: that you had been to the tax office and examined the records and had discovered that on or about the 24th of May, 1901, Mr. King had paid some arrears of taxes and redeemed a second tax sale of this property which, at that time, was still redeemable. A. I discovered that had been done; yes.

Q. My question is whether you do not remember having mentioned that fact to me, before this bill was filed? A. I think I very probably did; yes.

Q. Do you not also recall that you stated to me on that occasion that you did not see how it was possible that Mr. King could have made that examination and paid that tax without also discovering the tax sale which was irredeemable. A. Yes; and I think so still.

Q. My question is whether you did not communicate that view to me? A. Yes.

747 Q. Do you remember telling me, before this bill was filed, that on or about the 24th of May Mr. King had called to see you with a view of having a new lease from Mrs. Kennedy, as a substitute for the existing lease? A. I have testified that he called on the 21st day of May.

Q. That was the first time? A. Yes; I have testified to that fact.

Q. That is not my question. My question is do you not remember telling me, before the bill was filed, of that visit of Mr. King's, and its purpose. A. I think I did; yes.

Q. Do you remember having told me on that occasion that you believed Mr. King then knew of the irredeemable tax sale, and that his scheme was to get another lease out of you while you were in ignorance of that fact, and by that means escape the consequences of the forfeiture? A. I think I did; yes.

Q. Now I want to ask you if, at the interview at Dr. Fry's house, Dr. Fry did not say substantially this: that Mr. Darlington had advised him that the tax title was invalid and of no consequence, and could easily be set aside, and that his client, Mrs. King, would undertake to do so; that the easiest means of settling the whole matter and avoiding litigation would be for Mrs. Kennedy to allow Mrs. King to pursue that course; and that he, Dr. Fry, in the interest of Mrs. Kennedy's health had informed her of Mr. Darlington's statement and advised her, Mrs. Kennedy, to adopt that course?

748 Mr. DARLINGTON: I have not objected to this examination for some time past, notwithstanding its manifest incompetency, because I understood it to be offered in vindication of Mr. Webb's professional position.

Mr. PERRY: So far as I was concerned, that was the offer.

Mr. DARLINGTON: I must now object to any effort to get upon the record such alleged statements by Dr. Fry. Dr. Fry is perfectly accessible, and if he can be induced to come into this case and testify to any such facts that is the proper way to prove them. I object to the question on these grounds and object to any answer that may be made.

Mr. JOHNSON: I wish to say that I offered the evidence of Mr. Webb not in proof of the fact that Mr. Darlington made any such statement, but simply in proof of the fact that Dr. Fry made that statement.

Mr. DARLINGTON: If Dr. Fry made such a statement as that he ought to be here to testify to it.

A. I do not recollect Dr. Fry making all of that statement; but he made part of it and possibly the whole; possibly the substance of it.

Mr. DARLINGTON: I renew my objection to testimony as to possibilities. It only emphasizes what I have said that if Dr. Fry made any such statement it is competent for the gentlemen to prove it in a competent way, and I would like to have them do it.

By Mr. JOHNSON:

Q. Tell us, as nearly as you can recollect. A. As nearly as I can recollect Dr. Fry reiterated the statement which he made to
749 me over the 'phone on the 26th day of October, 1901.

Q. Do you remember that when Dr. Fry made the statement, whatever it was, that you made some remark to the effect that he had been advising Mrs. Kennedy contrary to the advice of yourself, her counsel, and according to the advice of counsel of her adversary.

Mr. DARLINGTON: I object and will move to strike out any answer that may be given.

A. I do not remember that.

Q. You do not remember making that statement? A. No, I do not.

Q. Do you remember Dr. Fry saying in reply to that that he had not undertaken to interfere with you, and that his only interference was in the interest of Mrs. Kennedy's health?

Mr. DARLINGTON: I object to the question and will move to strike out any answer that is given.

A. I do not remember those words.

By Mr. JOHNSON:

Q. Do you remember anything like that, in substance? A. No; I do not think I do.

Q. I believe you have already stated you made some remark to Dr. Fry to the effect that you would have to retire from the case. A. I did say something like that to him; yes.

Q. With reference to what? A. I do not remember what remark Dr. Fry made; but it was some remark which was rather a
750 reflection on me, as I took it, and I at once told him if he and Mrs. Kennedy were not satisfied with the way I had conducted the case I should get out of it at once.

Q. I will ask you to state whether or not you recall my making

this remark to Dr. Fry: That litigation was inevitable; that whether Mrs. Kennedy evicted her tenant or not, she would have to get rid of the tax title and that could not be gotten rid of without litigation.

Mr. DARLINGTON: I object and will move to strike out the answer.

A. I remember some such remark as that. I remember Dr. Fry saying that he thought it would be easier for Mrs. Kennedy to fight the tax title than to fight for a forfeiture of the lease.

Re cross examination.

By Mr. DARLINGTON:

Q. You, as a lawyer, knew that if the Kings succeeded in getting a new lease, in the spring of 1901, with a knowledge of the forfeiture on their part and with ignorance of that forfeiture upon the part of Mrs. Kennedy, the new lease would not change the situation any. A. I did not consider that subject.

Q. Have you not testified in this case that you, for Mrs. Kennedy, offered to give them a new lease; and that they could have had it if they would have taken it? A. I did.

Q. How do you reconcile that with your statement to Mr.
751 Johnson? A. What is that statement?

Q. That you thought his claim was to get another lease out of you while you were in ignorance of the fact of the forfeiture, and thus get rid of it. A. I said that idea occurred to me.

Q. But you offered Mr. King a new lease, and there was no obstacle in the way of his taking it, if he had had any such object as that; was there? A. No.

Q. Do I understand that you did complain to Mr. Johnson that Mr. Darlington and Mr. Tobriner had not acted properly, and that Mrs. Kennedy's change of attitude was due to them? A. I do not think I did.

Q. What change of attitude on her part do you refer to, in this connection. A. I would like to state that when I last saw Mrs. Kennedy, on the 23rd day of October, and when I last saw Dr. Fry on the 21st of October—from that time until the next time I saw them they had both experienced an entire change of view with regard to this whole matter.

Q. What was this changed view, to which they had come? A. They seemed to want to do exactly the opposite to what they had wanted to do before.

Q. They wanted to waive the forfeiture and drop the Kanns? A. They seemed to want to fight the tax title.

Q. Did they not also seem to be willing to compromise with the Kings and drop the forfeiture? A. Yes; and I accordingly
752 made that offer of compromise, at the request of Mrs. Kennedy.

Q. Are you not mistaken in saying that the litigation was

begun by Mrs. Caroline King? A. This suit was instituted by Mrs. Caroline King.

Q. This was not the first suit, was it? A. There was a suit for possession.

Q. By whom? A. It was started by Mrs. Kennedy.

Q. That was in pursuance of her agreement with Mr. Johnson, in behalf of the Kanns, that she would enforce the forfeiture and let them have the property? A. No; it was in pursuance of her intention, as indicated by her notice to quit on the 4th of October.

Q. But you have told us that she had undergone a change of attitude then? A. Yes; she had; but after her offer of compromise was declined she went back to her first attitude.

Q. You have testified that on or shortly after October 9th she had accepted the Kanns' proposition that she should forfeit the lease, and lease the property to them? A. Yes.

Q. Was not this landlord and tenant proceeding in pursuance of that arrangement? A. I did not consider it so.

Q. Was not that the first step and a necessary step to enforce the forfeiture? A. Yes; but she had given them notice to quit on the
753 4th day of October, prior to this offer of compromise from the Kanns.

Q. I understand, then, that you did not consider this landlord and tenant proceeding of November 9th to be in accordance with her arrangement with the Kanns, that she would enforce the forfeiture and let the Kanns have the property? A. No.

Q. Was it not for the very purpose of enforcing the forfeiture and securing possession, so that the Kanns could take the property? A. That was one of the ideas; yes.

Q. Was not that the clear purpose, intention and object? A. Not necessarily so.

Q. In what respect was it not necessarily so? A. She had determined to forfeit the lease.

Q. You have told us that, but what purpose had she in evicting the Kings, except for the purpose of carrying out her arrangement with the Kanns and letting them have the property? A. That was her purpose at that time.

Q. Do you know of any way in which Mrs. King could have avoided the litigation, unless she was prepared to abandon her business and her lease? A. I do not.

Q. You have told us to-day how you figured up $70,000 as liquidated damages. Why then did you state in your answer that you were unable to state whether the property was worth more
754 than the amount of the legacies, or $40,000? A. That was considering that the present lease should be maintained.

Q. Did you conceive it possible that a lease for only six years with a difference in rental of $1200 per annum could cut the value of the property in half? A. I thought that would make a great difference.

Q. You though that would cut the value of the property in half? A. Not necessarily cut it in half.

Q. The difference between $40,000 and $70,000? A. That is pretty nearly half.

Q. You thought the fact that this lease might be sustained—— A. Where is that in my answer?

Q. You will find it on page 75. My question is: If you thought the property was worth $70,000, figuring the way you did figure, why was it that when you came to put in your sworn answer here you say, at page 75: "This defendant is not able to state whether the amount of said estate will largely exceed in value the amount of said legacies." A. Of course I considered that a difference in the revenue of $1200 would make a great deal of difference in the price of the property. An assured revenue of $3600 is more than an assured revenue of $2400. The amount of the legacies given here is some $40,000; and that is just what the property was valued at when the bond was given in this case.

755 Q. Are you not mistaken when you say that Mrs. Kennedy's first attitude was to enforce the forfeiture? A. No, sir.

Q. How do you explain her letter of September 29th, in which she says she does not see how she is to refuse the rent unless she knows when she is to get another tenant. A. That was before she had made up her mind.

Q. She did not make up her mind until she found that she could get another tenant at a higher rent? A. I did not understand that she had fully decided to forfeit the lease until I brought her the news that she might be able to get another tenant.

Q. Refreshing your recollection by Mr. Johnson's interrogatories to-night, you say that you proposed to him to go to Dr. Fry's and he declined to go until you had first inquired of Dr. Fry whether it was agreeable; that you made that inquiry and Dr. Fry answered favorably and you all then called to see him. A. I told you that I was a little uncertain as to how that interview originated; but I do remember requesting Mr. Johnson to be there.

Q. Do you remember his declining to go unless you first ascertained whether Dr. Fry was willing to see him? A. No, I do not remember that.

Q. I think you said in reply to his question that you did remember it; am I wrong about that? A. I am mistaken if I said that.

Re-cross examination.

By Mr. BRADLEY:

756 Q. What was your object in informing Mr. Cohen of the fact that this tax title was irredeemable.

Mr. PERRY: I object to that as being not at all recross examination. Mr. Webb was recalled here for a specific purpose in connection with some matter Mr. Darlington desired to inquire

about. If there is any contest between Mrs. Dewey and Mr. Webb it should be introduced in another way. I object to the question as irrelevant here.

Mr. BRADLEY: In view of the fact that the examination has assumed a much wider latitude than that indicated by the specific purpose for which Mr. Webb was called, I feel justified in insisting on my question.

Mr. PERRY: You may answer the question subject to my objection.

A. I did not inform him of that fact. I will add that I had a letter in my hand, which I showed to Mr. Cohen, which said that the title was irredeemable.

Q. This letter was from whom? A. This letter was from the assessor of taxes. I think I got an official statement from the assessor of taxes in regard to all the taxes on this property, as I wished to find out the exact situation.

Q. To whom was that letter addressed? A. It was addressed to me.

Q. In what way did it come into Mr. Cohen's possession? A. I had it in my hand.

Q. And you showed it to Mr. Cohen? A. I showed it to Mr. Cohen.

Q. What was your object in showing it to Mr. Cohen? A.
757 I had no special object. I informed him of the condition of the taxes and I supposed he knew all about it.

Q. Did you not state, on your former examination in chief, that Mr. Cohen had stated to you that he knew of this tax title before you said anything to him about it? A. He told me that he did; yes.

Q. Did you state, in your former examination, that Mr. Cohen knew of the irredeemable character of this tax title, before you told him of it? A. I do not remember that at all.

Mr. JOHNSON: I want it understood, if it is not already plainly understood, that the questions I have asked Mr. Webb have been asked solely as justifying the averments of Mr. Cohen's answer.

Mr. DARLINGTON: I submit that they do not justify them, because Mr. Cohen says that they are based on information Mr. Webb gave him.

Mr. PERRY: I want to offer in evidence two papers, first, the original notice to quit, and second the original complaint in the landlord and tenant proceeding, which is in the printed record at page 23 as Exhibit H.

I understand counsel for the complainant to admit that the genuine signature of Mrs. Kennedy is attached to those papers.

Mr. DARLINGTON: Yes, sir.

The above mentioned papers are offered in evidence by counsel for the defendant Webb, and the same are marked "Exhibits H. R.

W. Nos. 25 and 26, and are in the words and figures following, to wit:—

758 EXHIBIT H. R. W. No. 25.

WASHINGTON, D. C., *October* 4, 1903.

Mrs. Caroline King.

DEAR MADAM: Whereas by a lease made on the 8th day of July, 1890, by and between me, Marianne A. B. Kennedy and Henry King, Jr., of premises known as 715 Market space in the city of Washington and District of Columbia, and the appurtenances thereunto belonging and by the renewals thereof made on the 27th day of December, 1892, and on the 8th day of October, 1896, it was covenanted and agreed that the party thereto of the second part, Henry King, Jr., his executors, administrators or assigns should pay the taxes assessed against the premises aforesaid,

And whereas, all the right, title and interest of said Henry King, Jr., in the said lease or in any renewals thereof were assigned and transferred to you, with my knowledge and consent, on the 26th day of August, 1897, by Harry King, administrator of said Henry King, Jr.

And whereas, you have failed to keep the said covenant to pay the taxes aforesaid, I therefore elect and declare that the said lease has ceased and determined and is utterly null and void.

And I hereby notify you that I am desirous to have again and repossess the aforesaid premises known as 715 Market space in the city of Washington, District of Columbia, which you now hold of me, as tenant, and I hereby give you notice to remove from and quit the same at the end of thirty days from the date hereof.

MARIANNE A. B. KENNEDY.

759 Mr. DARLINGTON: We will agree that all the exhibits filed with the bill are in evidence.

HENRY RANDALL WEBB.

Subscribed and sworn to before me this 13th day of April, A. D. 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

The further taking of these depositions was thereupon adjourned until Friday, November 27th, 1903, at 1 o'clock p. m.

WASHINGTON, D. C., *November* 27, 1903—1 o'clock p. m.

Met pursuant to adjournment at the office of Wolf & Cohen, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendant Webb, Mr. Perry.

Present on behalf of the defendants Cohen and Kann, Mr. Johnson.

760 JOHN RIDOUT, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined

By Mr. JOHNSON:

Q. Mr. Ridout, you are a member of the bar of the District and have been for a number of years? A. Yes, sir.

Q. Do you know Mr. Myer Cohen? A. Yes, sir.

Q. How long have you known him? A. At least ten years.

Q. I will ask you to state whether or not, on or about the 30th of September, 1901, you had a conversation with Mr. Cohen, and if so state where and in what manner that conversation took place. A. I had a conversation with him by telephone on the evening of a day in the latter part of September, 1901.

Q. Will you state where you were? A. I was at my residence.

Q. Where was that? A. 1748 N street, northwest.

Q. Can you tell us what time in the evening that conversation took place? A. I have the impression that it was at some time between 9 and 10 o'clock p. m. It may have been between 8 and 9.

Q. I wish you would state, as near as you can, the conversation that took place between you and Mr. Cohen, or the substance of it?

761 Mr. DARLINGTON: I object to any testimony as to this conversation unless it should appear that it was in the presence of the complainant, as being otherwise incompetent and inadmissible for any purpose.

A. I recognized Mr. Cohen's voice; and he inquired of me if I knew the address of Mr. Charles H. Wiltsie, stating that he wished to communicate with him in respect of a tax sale. I told him Mr. Wiltsie's address was in Rochester, New York, and added that it would be wise for Mr. Cohen to act promptly in any communication with him, stating as a reason that Mr. Wiltsie was quite onerous in his requirements. What I have said is my best recollection of the substance of the statement I made to Mr. Cohen. I am not able at this time to give the exact words.

Q. Can you recall whether you gave him any more definite address than Rochester? A. The Powers building in Rochester, New York.

Q. Do you remember whether Mr. Cohen informed you as to what

he was going there about and whether anything was said about money?

Mr. DARLINGTON: Let it be understood that my objection applies to every part of this conversation and to both questions and answers.

Mr. JOHNSON: Certainly.

A. Mr. Cohen told me that he wished to see him in connection with a tax sale purchase which Wiltsie had made of some property in the District of Columbia. I do not recall that he stated what lot was involved. I have an impression that I added in my suggestion as to promptness that it would be well for him to be prepared
762 to make prompt payment.

Q. Is that all you can recall of it? A. That is all I recall.

Cross examination.

By Mr. DARLINGTON:

Q. I understand, Mr. Ridout, you were called up by Mr. Cohen who desired, or told you he desired, to see Wiltsie about the redemption of some property from a tax sale? A. Yes, sir.

Q. And you told him it would be wise for him to act promptly in any communication with Wiltsie? A. Yes. As I have said, I might not have used the exact language, but the idea I wished to convey to him was——

Q. Of course the idea you wished to convey will not help us any. I wish you would recall as well as you can what you did say? A. I think what I have said expresses it as accurately as I can express it.

Q. Did you tell him why it would be wise to act promptly in any communication with Wiltsie and be ready to make a cash payment? A. Yes.

Q. Is this what occurred: Did Mr. Cohen say, What kind of a man is Wiltsie, and did you reply "He is a gouger?" A. I recollect, being refreshed by the asking of the question, that he did ask me what sort of a man Wiltsie was. I do not recall that I used the expression "gouger."

Q. Was not that your expression instead of the statement that he would be wise to act promptly with him and be ready to
763 make a cash payment? A. I cannot recall using that expression, but I do distinctly recall impressing upon him the importance of prompt action.

Q. Did you give any reason for that? A. The reason I have already told you, that Wiltsie was onerous in his requirements.

Q. No others? A. I recall no others.

Q. By "onerous in requirements" you meant what? A. I meant that he would undoubtedly require spot cash, and quite a large bonus, or advance on the price he had paid for the taxes.

Q. By "quite a large advance" you mean what? A. I had had transactions in which he had added 100 per cent. He had made

an additional charge of at least 100 per cent. over the price he had paid.

Q. Did you so advise Mr. Cohen? A. I did not give him the rate per cent., as I recall it now.

Q. That is, however, what you referred to? A. That is what I referred to.

JOHN RIDOUT.

Subscribed and sworn to before me this 25th. day of April 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

764 WATSON J. NEWTON, a witness of lawful age, called by and on behalf of the defendant-, having been first duly sworn, is examined

By Mr. JOHNSON:

Q. Mr. Newton, you are a member of the bar of the District, I believe? A. Yes, sir.

Q. And you have been for some years? A. Since 1877.

Q. What is your special business at this time? A. My special business at this time is general law business. In addition to that I occupy the position of president of the District Title Company.

Q. What is the business of that company? A. Examining titles and certifying them, of record.

Q. Did you occupy that relation to that company in September, 1901? A. Yes, sir.

Q. Do you remember a visit to your office on or about the 30th of September, 1901 by Mr. Myer Cohen? A. Yes, sir.

Q. I wish you would state whether or not that visit occurred before or after the business office hours? A. It was after the close of business.

Q. Can you state the circumstances under which he came to make that visit? A. The office was about closing, or had closed, and I was still there. I received a telephone message purporting to come from Messrs. Wolf and Cohen asking whether I would wait
765 until some one from their office could see me. I think it was Mr. Cohen who was to come up, but I do not recollect. I telephoned back that I would wait and keep the vault open and a few minutes afterwards Mr. Cohen came into the office to see me.

Q. I will ask you to state, if you can, what was the closing hour of the office? A. 4.30.

Q. When Mr. Cohen got there, were there any other officials of the company there than yourself? A. I think myself and the janitor.

Q. He is a mere servant of the company? A. A servant; yes.

Q. I wish you would state whether or not Mr. Cohen asked you to give him any information from the records of the company?

Mr. DARLINGTON: I object to this line of testimony as being immaterial to any issue in this case; and it is agreed that this objection may apply to the answer to the question and to any future questions and answers upon the same subject.

A. Mr. Cohen wanted some information about a piece of property, lot A, square 432 in the city of Washington.

Q. Did you give him any information in respect to that? A. I did.

Q. Did you give him any information from a record or otherwise? A. I took Mr. Cohen back first to my general index book under which the lots and squares are tabulated and from that
766 index I found the reference to the books in which we have all the deeds—written portions of the deeds, written out. I got that book and showed him an entry in that book.

Q. Have you that book here? A. I have.

Q. I wish you would produce it. A. The book is known in our office as No. 5 of 1899. The numbers relate to the months of the year. There is the book (producing a book).

Q. Have you the entry before you which you exhibited to him? A. Yes, sir.

Mr. JOHNSON: I do not suppose you expect Mr. Newton to file this book?

Mr. DARLINGTON: Oh, no.

Mr. JOHNSON: Will you consent that he may read the entry in the book, subject to any objections that would apply to the original?

Mr. DARLINGTON: Yes.

By Mr. JOHNSON:

Q. I will ask you, Mr. Newton, to read the entry which you showed Mr. Cohen. A. I may say that this is a reference to a tax sale and that all those deeds are so much alike we simply tabulate them instead of putting out the full written description as we do in other deeds.

Q. Will you please read the entries that you exhibited to Mr. Cohen? A. The beginning is "Tax sale," which does not
767 appear on this page. The top shows "Lot assessed," "Sold to," and the page of the book. The sixth line reads as follows: "432" in the first column, which is a reference to the folio of the liber. The next column is "Sub A" under the word "lot." The next, under the word "assessed" meaning the person to whom the property was assessed, is "Maria T. Gillis," and under the words "Sold to" is "C. H. Wiltsie." This would have reference to the 9th of May, 1889. The tax sale was made on that day.

Q. Does the square as well as the lot appear? A. I have given you 432 wrongly. That 432 relates not to the folio but to the square.

Q. I will ask you to state whether or no on the occasion of that visit Mr. Cohen made any inquiry of you, and whether you gave him any opinion, and if so, state as nearly as you can what the inquiry was and what the opinion was that you gave. A. I think there was some inquiry made as to the validity of tax sales, and I think I stated that if any one obtained possession under a tax sale and acquired it in a peaceable manner, that unless they could pick a flaw in the proceedings of the tax sale it would be very hard to dispossess a man.

Q. Do you recall anything else? A. I do not recall anything else just now.

Q. Do you remember whether or not you expressed any opinion about the law under which this sale was made? A. I cannot recollect what I may have said upon the subject. I think there
768 was an inquiry about the validity of *of* the law, or something of that sort; but practically what I have said in answer to that would be what I intended to convey as my opinion, that the burden of proof was placed entirely in the new law upon the other side. Previously the burden of proof had always been on the person who had to sustain the tax sale.

Q. Do you recall whether or not you made any charge for the service rendered Mr. Cohen on that occasion? A. Yes, sir; I made a charge of $5—or the title company did; not I, personally.

Q. Where and when was that charge made? A. That charge was made on October 3, 1901.

Q. What book is that that you have? A. This is our book of orders in which the original orders are entered as they come in.

Q. Have you an entry of that charge? A. I have. 10,358 is the number.

Q. In whose handwriting is that? A. It is my own.

Q. When was that made with reference to the interview with Mr. Cohen? A. My impression is it was made—in fact, my knowledge is it was made a day or so after the interview. The circumstances which lead me to say that are as follows: I told Mr. Cohen that I would charge or at least that I expected to charge, or he told me that I might charge it, and I intended the next day to make the charge. It was late then; and it slipped my mind. Mr. Cohen telephoned me up for the bill one day and I made the entry
769 and sent the bill down. If he had not telephoned me I think I should have forgotten all about it.

Mr. JOHNSON: I suppose that entry may be read in evidence with the same effect as the original?

Mr. DARLINGTON: Oh, yes; the same effect or want of effect.

By Mr. JOHNSON:

Q. Will you just read the entry to the examiner? A. On the first line "Date, October 3. No. 10,358. Application, Wolf & Cohen." Under the words "Nature of the order, special search and

verbal opinion, $5." After the word "Property" in print, "Lot A, square 432."

Cross examination.

By Mr. DARLINGTON:

Q. Mr. Newton, what is this Book No. 5, 1899? A. That is one of a series of books in which, in addition to our chain, we take off the written portions of all the deeds. In other words, we have an abstract plant in addition to a chain plant.

Q. It is, then, a book in which you record or copy the substance of the deeds that are recorded? A. The substance of the deeds that are recorded.

Q. Anything more than that? A. In this case it would be practically the same entry as would appear at the record office itself, because they enter them in the same manner. They list them the same.

Q. Your entry in regard to sublot A, square 432, was not a copy of any deed, was it? A. No.

770 Q. What was it a copy of? A. A tax sale, a list.

Q. That is of the report made by the District officials? A. A report made by the District officials of the sales made and to whom—just the list.

Q. As recorded in the recorder of deeds' office? A. Yes, sir. There was no deed at that time.

Q. Does that book contain any data as to the proceedings in the tax sale, as to whether they were regular or irregular? A. No, sir; not at all.

Q. Had you in your office any data on that subject when Mr. Cohen called? A. As to whether the sale was regular or otherwise?

Q. Regular or irregular; yes, sir. A. Nothing but the tax sale book itself, containing the advertisements from which we could determine perhaps some irregularity if there was any.

Q. Was that book examined in connection with Mr. Cohen's visit? A. No, sir; the only books that were examined were the index and the abstract book.

Q. You did not then make any examination of the proceedings to see whether the proceedings were valid or invalid? A. No, sir.

Q. Did you express any opinion as to whether the tax sale was valid or invalid? A. I think the only opinion I expressed

771 about the matter was that this was a new law, that it had not been tried, and that if quiet and peaceful possession were obtained, legal possession, that is, in a legal manner, under a tax deed and all the proceedings were valid and in accordance with law, that any one who wanted to oust the possessor under the tax deed would have a great deal of trouble.

Q. He would have the burden of proof? A. He would have the burden of proof.

Q. But as to whether or not the proceedings had been regular or sufficient so as to make a valid title, you made no examination and gave no opinion? A. None whatever, sir. I did not do that. I could not do it, from my records up there.

Q. One of the answers in this case states that Mr. Cohen was "advised by the president of said company that in his opinion the said certificate was good and valid and would pass a good title to said premises." I assume from what you have said that that is not quite accurate, is it? A. I think perhaps Mr. Cohen rather overestimated my answer.

Q. Did you tell him if he could secure peaceable possession of the premises under the deed, in your opinion he would have an indefeasible title to it? A. I don't think I went as far as that, sir. In fact, I know I could not have gone so far as that.

WATSON J. NEWTON.

Subscribed and sworn to before me this 25th. day of April, 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

772 CHARLES H. KNIGHT, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined

By Mr. JOHNSON:

Q. Mr. Knight, you reside here in the city, do you? A. Yes, sir.

Q. For how long? A. For about twenty-five years.

Q. What is your business? A. I am in the real estate business now.

Q. I will ask you to state whether or not in September, 1901, you called upon either Louis or Sigmund Kann, the defendants in this suit, at their place of business on Market space? A. I called at the store of the Messrs. Kann.

Q. Can you give us the date of that visit? A. It was about the latter part of September, 1901.

Q. Is that as near as you can express the date? A. Yes, sir.

Q. Do you know which of the Kanns you saw? A. No, sir; I do not.

Q. I will ask you to state if you made any communication to Mr. Kann with reference to premises No. 715 Market space?

Mr. TOBRINER: Objected to because it is not testified to by the witness that he saw any of the Kanns.

A. I called at Mr. Kann's store, being under the impression that the property that had been sold for taxes was included in their stores, and I saw one of them.

773 Q. I will ask you to state where did you see the gentleman of whom you have spoken? A. In the store.

Q. Can you tell us about what part of the store? A. It was at his office.

Q. Tell us now as nearly as you can what took place. A. I made inquiry of him with regard to the property that had been sold for taxes. I had located it from the plat book as being 715 Market space. He said that the place—before saying so, he looked to see what it was. He went outside with me, and there I saw the number, 715, on the door, or over the window, and he told me that the property belonged to a Mrs. Kennedy; that Mr. Webb here was the attorney for Mrs. Kennedy, and suggested that I go and see Mr. Webb about it.

Q. I will ask you to state whether or not on that occasion Mr. Kann informed you whether or not he was the occupant of that property. A. He said he was not.

Q. Did you observe at that time any indications by any sign or otherwise as to how the property was occupied? A. I saw on the windows or some place "King's Palace."

Q. Have you stated all that took place between you and Mr. Kann? A. That is substantially all that took place.

Q. I will ask you to state whether or not on any other occasion you went to that store or elsewhere and saw either of the Messrs. Kann with reference to this matter? A. I never have seen them from that day to this.

774 Q. Did you afterwards go to see Mr. Webb?

Mr. TOBRINER: Objected to as leading. Ask him what he did.

A. I went directly to Mr. Webb's office upon leaving Kann's store.

Q. State whether or not you saw him on that occasion? A. Yes, sir; I did.

Q. Do you know Mr. Myer Cohen? A. Yes, sir.

Q. I will ask you to state when, after that visit, to the Kanns' store, you first met and spoke to Myer Cohen? A. It is probably less than a year ago.

Cross examination.

By Mr. PERRY:

Q. You say you think you saw Mr. Webb on the same day? A. Yes, sir.

Q. Where did you see Mr. Webb? A. In his office.

Q. Why did you see him? A. I went to see him for the purpose of seeing what his relation was to the owner of the property, with a view of getting a contract for the cancellation or annulment of the tax sale that was against the property.

Q. Had you had any previous interview with Mr. Webb about this matter? A. No, sir.

Q. So far as you know, did he have a knowledge of the subject matter of it? A. No, sir.

775 Cross examination.

By Mr. TOBRINER:

Q. You say you are engaged in the real estate business. A. Yes, sir.

Q. Any other occupation? A. Well, yes; I undertook and am making a little specialty of getting contracts for the annulment of these tax sales.

Q. And it was with that purpose, as I understand you, that you first called upon the Kanns? A. Yes, sir.

Q. For the purpose of obtaining a contract for the annulment of the tax sale with respect to the property 715 Market space? A. Yes, sir.

Q. How long a time were you engaged in conversation with Mr. Kann? A. Oh, it probably was not two minutes.

Q. Just state as well as you can recollect what you said to him—the substance of it, not the exact language, but the substance of what you said to him on the occasion of that visit. A. I asked him about the property. I think I told him the lot and square, the name of the person to whom the property was assessed, and asked if that property was either owned by him or in his possession or if he could tell me who the owner was. I stated to him my business, what I wanted to see about.

Q. You stated to him your business and what you wanted
776 to see him about in connection with that property? A. Yes, sir.

Q. What did you say to him in that connection? A. I told him that I wished to see the owner or person that had control of it, that the property had been sold for taxes and that I believed the sale was illegal.

Q. Did you say anything else to him? A. I don't remember saying anything particular about it. When I first spoke to him and called it to his attention, he went outside with me to locate the particular piece of property. I had the number of it, and he told me it belonged to Mrs. Kennedy, that it was not occupied by them at all.

Q. Did you state to him the reasons why you thought the sale was illegal? A. No, sir.

Q. What reply did he make to you when you stated to him that you had come for the purpose of obtaining a contract to annul that sale because of its illegality? A. He simply told me that the property belonged to Mrs. Kennedy and referred me to Mr. Webb as her attorney.

Re-direct examination.

By Mr. JOHNSON:

Q. Mr. Knight, are you positive that you told Mr. Kann that there was any irregularity in this tax sale? A. I am quite sure

that I told him the property had been sold for taxes and that it was illegal. That is my recollection now.

Q. You did not recall that the other day when you spoke
777 to me about it, did you? A. No, I guess I did not.

Q. You told me then that the only information you gave him was that it had been sold for taxes, did you not? A. That it had been sold for taxes, and I think I told him that the sale was illegal.

Q. I understand that, but when you were talking to me about it the other day did you not tell me you had not given him any information except the fact that it had been sold for taxes? A. That was the best of my recollection then.

Q. At that time? A. Yes.

Q. Now you think you did mention—— A. I think I did mention that the sale was illegal.

Q. Has anything occurred between that conversation and this to make your recollection any more perfect? A. I cannot remember that there was anything more said, I would not be absolutely certain that I did tell him. I have a kind of a recollection that I did, but I could not say positively that I did tell him.

Q. Do you remember my particularly asking you if you did make any communication on the subject of the validity or invalidity of the tax sale and your saying you did not comment at all when you found he was not interested in the property, that you said nothing about it? A. I did not tax my memory particularly with that conversation nor just what I told him and just what was said. The main gist of the whole thing was that Mr. Kann told me that they did not occupy the property and did not own it, and who did,
778 and I think when I approached him about it I told him that the property had been sold for taxes, that I wished to see the owner of the property for the purpose of getting a contract to annul the sale, and he went outside and looked at the place that I had designated, 715 Market space, and told me that Mr. Webb was the attorney for Mrs. Kennedy.

Q. Had you ever had any business for either of these gentlemen before that? A. For the Kanns?

Q. Yes. A. No, sir; I had never seen them before to know them. I would not know either of them now if I saw them.

Re-cross examination.

By Mr. TOBRINER:

Q. Mr. Knight, you went to Mr. Kann, as you say, for the purpose of beginning a contract to annul this alleged illegal tax sale? A. Yes, sir.

Q. You told him what you had come for? A. To find out who the owner was.

Q. You told him the purpose for which you had come there? A. I think I did.

Q. Do you recall, along about the 5th, 6th or 7th day of October, 1901, of meeting Mr. Tobriner in front of or near the District building, and that Mr. Tobriner asked you whether you had been interested in the sale of lot A in square 432 for taxes, and that
779 at that time you informed Mr. Tobriner that you had investigated that sale, that you had gone down to the place and seen Mr. Kann for the purpose of getting a contract to annul the tax sale because of its illegality, and told him (Kann) that the sale was illegal, and when questioned by Mr. Tobriner for the ground upon which you based your opinion that it was illegal, you informed Mr. Tobriner that the property had been sold in the name of Maria T. Gillis, whereas the true owner was Marianne A. B. Kennedy? A. I don't remember of telling you that.

Q. Do you recall having had a conversation with me about that time? A. I remember of meeting you as you state. I think it was in front of the District building, but I don't remember of stating to you any grounds that I relied on for the annulment of the tax sale.

Q. Is the rest of my statement of the conversation that took place between us correct about your interview with Mr. Kann? The matter was fresh in your recollection at that time? A. Substantially, yes.

Mr. TOBRINER: I will ask the examiner to repeat the question, omitting the reference to the ground of the illegality.

Mr. PERRY: Mr. Perry objects to that as not a fair way of questioning the witness.

The examiner read the question as follows:

Q. Do you recall along about the 5th, 6th or 7th day of October, 1901 of meeting Mr. Tobriner in front of or near the District
780 building and that Mr. Tobriner asked you whether you had been interested in the sale of lot A, square 432 for taxes, and at that time you informed Mr. Tobriner that you had investigated that sale, that you had gone down to the place and seen Mr. Kann for the purpose of getting a contract to annul the tax sale because of its illegality.

Mr. PERRY: This is so mixed up that I do not know what the question asked the witness is. You may know, but I do not.

Mr. DARLINGTON: If he does not know, Mr. Perry, he can say so.

A. I did not go to see Mr. Kann for the purpose of getting any contract with them, but to learn who the owner of the property was.

Mr. PERRY: Speak a little louder, please, I cannot hear you.

A. I went to the Kanns' store for the purpose of finding out who owned the property and getting into communication with them for the purpose of the contract that I was after.

By Mr. TOBRINER:

Q. Did you not tell Mr. Tobriner in this interview that you told Mr. Kann in your conversation with him that the tax sale was illegal? A. That is my recollection now.

CHARLES H. KNIGHT,
By the Examiner, by Consent.

Subscribed and sworn to before me this — day of —— 1903.

——— ———,
Examiner in Chancery.

781 LIDIE ADDISON, a witness of lawful age, called by and on behalf of the defendant-, having been first duly sworn, is examined

By Mr. JOHNSON:

Q. Miss Addison, will you please state how you are engaged? A. In the assessor's office.

Q. Of the District of Columbia? A. Yes, sir; of the District of Columbia.

Q. Were you a clerk in that office in the year 1900? A. Yes, sir; I came in January, 1900.

Q. I will show you a tax bill which is designated as Exhibit Rogers No. 2 in this case and ask you to state in whose handwriting that bill is made out, if you know? A. It is in my handwriting, sir, the ink part of it.

Q. It bears the signature "E. G. Davis." A. He is the collector of taxes.

Q. Is that his signature? A. Yes, sir; it looks like it.

Q. It also has this across the face of it "Caroline King and Sons." Do you know whose handwriting that is? A. No, sir; I do not.

Q. I observe in the corner of it the initials L. A. Do you know by whom that was written? A. Yes; those are my initials.

Q. What was the purpose of putting those there. A. All the clerks have to put their initials on everything they do.

782 Q. Do you mean to show it was made by you? A. Yes, to show it was made by me.

Q. I wish you would look at that tax bill and state if you can when you prepared it. A. When it was dated, July 24, 1900.

Q. It appears to have been paid the same day? A. Yes sir.

Q. Was the payment made in the same office where you were? A. In the collector's office, in the back part of the room.

Q. There is a penalty of five per cent. charged and computed upon this bill, amounting to $13.42. Is that also in your handwriting? A. Yes sir.

Q. How about the footing of the bill? A. That is in mine, too.

Q. Can you state whether there ever was inaugurated in the tax office a practice of making out bills in advance and having them in

a box ready for delivery? A. There has been, but not that year; not until the following year, 1901.

Q. Can you state whether or not you made out and deposited this bill in a box or on a table to be delivered when called for? A. No, I could not. I gave it to the person.

Q. Have you any personal recollection of making out this particular bill? A. No; I have no personal recollection of it.

783 Q. I will ask you to state, at the time of making out that bill, what, if anything, you had to do with arrears of taxes? A. I had nothing to do with them, sir.

Q. What, if any, knowledge did you have about the existence or non-existence of arrears of taxes? A. I knew there were arrears, but I was not in the arrears division. I knew the arrears division was down-stairs, in another room.

Q. The point is what personal or official knowledge did you have of the existence of arrears of taxes on this particular property? A. I had no knowledge of their existence on that property, but I had a general knowledge that a good many pieces of property were in arrears.

Q. Do you know a man named Rodgers, who is employed as a bookkeeper for the Kings, merchants of this city? A. No, sir.

Q. I will ask you to state whether or not at the time of making out and delivering that bill you stated to Mr. Rodgers or anybody else that there were no arrears upon that property or anything to that effect? A. I did not.

Q. I will ask you to state whether at the time of making out and delivering that bill you had any personal or official knowledge that would have enabled you to give any information on the subject of arrears or not on this property? A. I had no knowledge of arrears on that special piece of property.

784 Q. Had you at that time ever been employed in the arrears division? A. No, sir; I never had been in the arrears division.

Q. You had been in the tax office at that time about six months? A. Yes, about. I went in January 9, 1900.

Cross examination.

By Mr. DARLINGTON:

Q. Miss Addison, if I understand, you have no recollection of this particular bill, Exhibit Rodgers, No. 2? A. No, sir.

Q. Do you know at whose request you made it out? A. No. I imagine that the person came and asked me for the bill—a man.

Q. But that is only a supposition? A. We made the bills out as the people asked for them.

Q. You did not attend the little window, the little pigeon hole at the window, where these requests were made, did you? A. Oh, yes; I go to the window.

Q. Were you in charge of one of those windows at that time? A. Not any special one.

Q. Did it not happen quite frequently that a clerk at a window would request you to make out a bill, he receiving the request from the person or owner who wished to pay it? A. Oh, yes.

Q. And this may have been the case with this bill, may
785 it not? A. Possibly.

Q. The request may have come to you through one of the clerks to make out the bill? A. No, I think not, because we usually made out the bills always when the people asked for them.

Q. But I have understood you to say it may have happened that you made out this bill at the request of one of the other clerks? A. No, sir; I think not as it is dated and paid on the same day.

Q. Is that the only reason you have for thinking it may not have been made out in that way? A. Well, I think it is more probable that the person who came for the bill asked me to make it and I made it for him.

Q. But is there anything to prevent the possibility or probability that the clerk who happened to be standing at the G box—— A. We had no boxes at that time.

Q. No pigeon holes? A. I thought you meant the boxes where the bills were put.

Q. No, I mean the pigeon holes. A. You mean the windows?

Q. Yes. Was there anything in the course of business at that time to negative the proposition—— A. No, sir.

Q. Please let me finish my question. To negative the proposition that Mr. Rodgers or some other person may have come to the
786 G pigeon hole and called for the bill and the clerk in charge may have requested you to make it out for him? A. No, sir; I think I must have made it out for the person who asked me for it.

Q. Why? A. Because the clerks are supposed to make out their own bills—each clerk.

Q. Did not that depend, to some extent, upon the rush of business at these windows? If one man was very busy, did he not ask somebody else to make them out? A. They usually stood one back of the other, and if you were at the window you stayed there for hours. I remember once in that special year being at a window standing three hours without raising my head up, making out bills for one person right after another.

Q. What were you doing during those three hours? A. Making bills for different people that were standing in line.

Q. If there was an unusual rush at one of the windows, and at another window there was no rush, no persons, would not the clerks at the other windows assist? A. At that especial time there was a rush at every window.

Q. Why? A. Because the bills were not made out ahead and it made a special rush. It was an especially heavy year.

Q. The whole year through? A. I was not there in November. It was only the May payment.

787 Q. At what time in May was this heavy rush? A. During the whole month of May.

Q. This bill, you observe, is made out in July. A. The 24th of July; yes.

Q. You are testifying to conditions that existed in May. A. I was thinking about that specially then.

Q. You had not observed that this bill is dated several months later? A. I was not thinking about it then; but June and July two were heavy months, though not as heavy as May.

Q. The simple fact is you have no personal recollection of just how this thing was done, have you? A. I have no personal recollection of the special incident connected with it.

Q. Have you any personal recollection at all of this bill? A. No, sir.

Q. Or of anything connected with it? A. No, sir.

Q. As to whom you gave it? A. No, sir; I have not.

Q. And I assume, of course, that you have no recollection of any conversation that took place between you and Mr. Rodgers on that occasion? A. No, sir.

Q. You say you did not tell him there were no arrears, and you say you think so because you could not have told him. A. I have never told any one, because I could not possibly know.

788 Q. I observe a little red letter A on this bill. Do you know who put that there? A. No, sir; I didn't put it there.

Q. I did not ask you that. I ask you if you know who did? A. No, sir; I do not.

Q. Do you know what it means? A. I know what it is purported to mean, but at that particular time we were not making that arrears mark. It was not until the following year, 1901.

Q. You began to mark the arrears mark at the same time you began to use this little box to lay the bills in? A. Yes, sir.

Q. Can you explain why this bill has this red letter A on it? A. No, sir; I cannot.

Re direct examination.

By Mr. JOHNSON:

Q. Miss Addison, I will have to trouble you to describe what this box was in which bills already prepared were placed? A. In 1901, when the taxes were paid in one instalment, which was a year ahead, the rush had been so great the previous year that they really would hardly compass it, and they had the boxes marked with the same letters the books have; and they were all arranged numerically in the boxes so we could easily find them, and of course they had been compared with the books.

789 Q. That making out of bills, you say, referred to bills in advance of the tax payment period? A. You mean the following year?

Q. The bills that were made out and put in this box. A. They were made to get ready for the payment of the following year, 1901.

Q. That is what I understood? A. Yes, sir.

Q. You made out the bills in advance? A. Yes, we made them a few months in advance.

Q. And that system commenced in the year 1901? A. 1901.

Q. Prior to that there was no such arrangement? A. The marks were put on the bills and the stamp was put on the backs of the bills.

Q. I am not speaking about the stamp box. I am speaking about this box. A. In 1901, I say, they started that.

Q. And prior to that there was no—— A. No, they made them as the people called for them.

Q. Where was the book kept from which you made out the tax bill? A. At the standing desks, the pigeon holes they call them, where the different lettering is on the outside of the windows.

Q. You had a high shelf desk or counter? A. Yes, sir; a standing desk.

790 Q. And that had openings in it marked with the letters of the alphabet? A. Yes, sir; and the books were on these desks corresponding with the letters on the outside.

Q. The book containing the assessment of taxes against the property in the name of Gillis or any one else beginning with G—— where was that book placed with reference to the window? A. On the G and H desk.

Q. Near a window on the G and H desk? A. Yes: the windows are right by the desks.

Q. In order to make out a bill from that book, how near to that G opening would you have had to stand? A. Well, right near it because the desk is right here and the opening is right here (indicating).

Q. In feet or inches how near to the opening would the book be? A. The desk is right up against the divison that separates it from the outside where the public come in; just right up against the division, and the window is right above it, just a little distance above it, where a person's head would come.

Q. Then the G book is immediately alongside the G opening. Is that it? A. Yes, sir.

Q. And that is the point at which you would stand to make out the bills? A. Oh, yes, sir.

Q. Could more than one person stand at that window or use the book at the same time? A. No, sir; they could not.

791 Q. If you had ever told anybody that there were no arrears of taxes due on that property, do you think you could remember it?

Mr. DARLINGTON: That is objected to as argumentative, hypothetical and not calling for any facts.

A. I certainly could, but I did not tell any one.

Re cross examination.

By Mr. DARLINGTON:

Q. Miss Addison, you say this little box containing bills already made out was inaugurated in 1901? A. 1901.

Q. What enables you to give that date? A. Because we were getting ready for the busy season, in May. The taxes were paid in one instalment in 1901.

Q. How does that fact enable you to remember this box system was initiated then? A. I couldn't say positively. I don't remember it. I just know it.

Q. What fact fixes it in your memory as being 1901 and not in 1900? A. Because it is an absolute fact. I don't know exactly what would fix it, but it is known by all the heads of the office.

Mr. DARLINGTON: I move to strike that out as not evidence.

By Mr. DARLINGTON:

Q. The occasion for using this box, as I understand you, was because the tax bills for the whole year were coming in one
792 instalment. A. Not especially for that reason; only to make them out ahead of time on account of *their* being such a rush. The work of the District had become so much heavier than it was in prior years.

Q. Did anything happen between 1900 and 1901 to increase the work of the District? A. Yes, sir; they seemed to think so.

Q. What was it? A. You mean the special reason why they paid in one instalment?

Q. No, did anything happen to increase the work of 1901 over that of 1900. A. No, I don't know that it was increased, but it was so enormous in 1900 that that is what made them decide to fix the bills ahead.

Q. The fact that the taxes were all payable in one instalment in 1901 did not increase the work of the office any, did it? A. We had a great deal to do with that prior to making these arrears on account. Arrears cards had to be made.

Q. My question is whether the paying of the taxes in one instalment increased the work of preparing the bills any. A. No, sir.

Q. It was just as easy to make a bill for a whole year as for a half year. A. No, sir; the reason they had it in one instalment was to mark all the arrears on the books and the bills both.

Q. I do not think you quite caught my question. It did
793 not take any more time to make out a bill for the whole tax in one instalment than in two? A. Not at all.

Q. If anything, it took rather less, because you did not have to divide it? A. I don't know that it took any less time, but it did not take any more time.

Q. If you are making a bill for half a year, you would have to take the amount of the tax and divide it? A. Yes, sir.

Q. Whereas if you are making the bill for the whole year you would put it all down at once? A. Yes, sir.

Redirect examination.

By Mr. JOHNSON:

Q. Miss Addison, you went to the tax office in January, 1900? A. Yes, sir.

Q. When was the first regular tax payment after that? A. In November, the previous year. After that the second half was due in May.

Q. I am speaking about the first regular tax payment with which you had to do? A. Well, in May.

Q. May of 1900? A. Yes, sir.

Q. Did you make out bills then? A. Yes, sir.

Q. Many or few? A. Very many.

794 Q. Was the work great or light? A. Very heavy.

Q. How many boxes of bills did you have previously made out to relieve you at that time? A. What did you say?

Q. How many boxes of bills did you have already made out to relieve you at that time? A. We had no boxes at all.

Q. Does the circumstance that you went through that first payment after you went in the office in May enable you to recall when the box system was established? A. Yes, it does.

Q. Was it established before or after that May? A. It was established in 1901, the year following that.

Q. When the system was established of making out bills and putting them in boxes to be delivered when called for, did you or did you not ever put in that box bills where the taxes were in arrears? A. In 1901?

Q. Yes, at any time after that. Did you put the bills in there that required the computation of penalties? A. I don't understand exactly what you mean.

Q. I will make it a little plainer. When were these bills put in the box with reference to the date when they were payable; before they were payable or after they were payable? A. They were put in just at the date when there were no arrears to put on them, but

795 of course as the time went on the arrears had to be put on them for that year, the one per cent. each month.

Q. My question is whether the bills in the box were the bills that were in arrear or not in arrear. A. No; the current work.

Q. When a bill was in arrear and the penalties had to be computed, was it or not put in that box? A. For that year it was in the box, but for the year previous it was down stairs.

Q. This bill is dated July 24 and shows on its face that there was 5 per cent. penalty due on it. A. Yes, sir.

Q. Did you put a bill in that form in this box? A. Not a bill of this date at all in the box.

Q. I am speaking of such a bill. A. Oh, a bill of 1900 that was

supposed to be ready in May without any penalty, of course it was there in June and July and so on during the year, and of course the penalty had to be put on.

Q. But it was not dated the date of its payment, was it? A. Not until you put the penalty on it.

Q. Have you any doubt about this box system having been—— A. No, sir, none whatever.

Q. Not established prior to 1901? A. No, sir; it was not established prior to that, but in 1901.

LYDIE ADDISON.

Subscribed and sworn to before me this 26th. day of April 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

796 WILLIAM B. TODD a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined

By Mr. JOHNSON:

Q. Mr. Todd, it has been developed in this case that Mr. Myer Cohen represents you in a matter connected with the property 715 Market space in this city. I wish to ask if you have any objection to stating your relation with Mr. Cohen in that matter and the nature of his professional duty to you. A. No, sir.

Q. Will you please state whether or not you have any contract? A. I have.

Q. Have you any objection to disclosing it? A. Not at all.

Q. Will you produce it?

(The witness produces a paper.)

Q. Do you consent that this may be offered in evidence in this cause? A. I do.

Mr. JOHNSON: Gentlemen, I would like to have it copied in the record, and the original returned to Mr. Todd. Of course if there is any objection to it, it may be noted.

Mr. DARLINGTON: There is no objection to having it copied.

The paper referred to is as follows:—

Memorandum of agreement made this 29th day of April, 1902, by and between William B. Todd, party of the first part, and Simon Wolf, Myer Cohen and Adolph G. Wolf, trading as Wolf &
797 Cohen, parties of the second part,

Witnesseth, that whereas the party of the first part has retained the parties of the second part to represent him to maintain such interests as he has as next of kin or heir at law, in the estate of Marianne A. B. Kennedy, deceased.

Now therefore, the party of the first part agrees to pay as compensation for services rendered and to be rendered to the parties of the second part, a sum equal to one-fourth of whatever property or money that may be recovered, said fee to be a lien upon said money or property. Party of the first part also agrees to pay proportionate share of court costs.

It is expressly understood and agreed that the parties of the second part do not represent party of the first part in any controversy affecting the tax title to sub-lot A, square 432, Washington, D. C., in which Myer Cohen represents and is to continue to represent the interests of S. Kann, Sons & Company.

In witness whereof the parties hereto have hereunto set their hands and seals in duplicate.

WILLIAM B. TODD. [SEAL.]
SIMON WOLF. [SEAL.]
MYER COHEN. [SEAL.]
ADOLPH G. WOLF. [SEAL.]

Witness:
L. HELEN ATNER.

By Mr. JOHNSON:

Q. Mr. Todd, at the time of entering into that contract with Mr. Cohen, state whether or not you knew that Mr. Cohen
798 represented the Kanns in the assertion of the validity of the tax title on this property.

Mr. DARLINGTON: The last witness having been a lady, I did not object to the very leading form of the questions addressed to her, but I do now object to the questions of that character.

By Mr. JOHNSON:

Q. State whether or not you understood Mr. Cohen's relations with them. A. I did.

Mr. DARLINGTON: I object further because it calls for a conclusion or opinion and not for facts.

By Mr. JOHNSON:

Q. How did you know Mr. Cohen represented the Kanns? A. I met Mr. Cohen accidentally on 14th and G street one day—I think it was in April, 1902—and in the course of conversation I asked him to get Mr. Wolf to attend to a little personal matter for me. The conversation went on and I related two or three funny little incidents of some of the heirs grabbing things at the time of the distribution of the personal property, when they were taking an appraisement in that way. He said "You are related to Mrs. Kennedy?" I said "Yes: she was my first cousin." Then he said "There is a remote contingency that you may get something in that." I asked him then if he could look out for my interests.

Then he said "I represent the Kanns in the tax title. I said "Well, of course if that tax title prevails there will be nothing, but if it should not, you can then look out for my interests." He said "Yes, I could." I said "Then go ahead." Subsequently about the latter part of April, he drew up this contract, which we both
799 signed.

Q. How did you understand that you might have an interest in the estate? A. I understood it would depend entirely on the way the court construed this surplus in case this property should be sold, and whether they would construe it as realty or personalty. If it was construed as personalty, of course the next of kin would take it, and if it was realty, it would go to the other side.

Q. After this conversation with Mr. Cohen and before the date of that agreement or contract, did you get any communication from any one? A. I received a letter from Mr. Andrew Bradley, representing Mrs. Dewey, requesting me to—— '

Q. You need not state the contents of it now. Is this Mr. Bradley's letter (handing witness a paper). A. Yes, sir.

Mr. JOHNSON: I offer that letter in evidence.

By Mr. JOHNSON:

Q. After the receipt of this letter state whether or not you acquainted Mr. Cohen with the facts contained in that letter. A. I wrote a letter to Mr. Cohen and enclosed him this letter, stating that——

Q. Never mind what you stated in the letter.

Mr. DARLINGTON: In the absence of Mr. Bradley, I object to the introduction of this letter in the case, on the ground of its utter want of materiality or relevancy to any issue in the case. If
800 Mr. Bradley himself desires the letter in, I shall waive the objection, and I consent to its going in subject to the objection.

The letter referred to is marked Exhibit Cohen No. 5, and is in the words and figures following, to wit:

"Long distance telephone east 36–A.

Andrew Y. Bradley, attorney and counsellor at law, No. 340 Indiana avenue, Washington, D. C.

In re estate Marianne A. B. Kennedy.

APRIL 11, 1902.

Wm. B. Todd, Esq., 1516 P St. N. W., Washington, D. C.

DEAR SIR: I represent Mrs. Maria G. Dewey, of New York, who is the heir-at-law of Mrs. Marianne A. B. Kennedy.

By the terms of Mrs. Kennedy's will all of her property is left to Mr. H. Randall Webb in trust, to be sold for the purpose of paying

certain legacies mentioned in the will. The value of the estate exceeds the aggregate of the legacies by thirty or forty thousand dollars, and as there is no residuary legatee mentioned in the will there arises a question as to whether the heirs-at-law or the next of kin are entitled to it. I am informed that you and your brothers and sisters are the next of kin to Mrs. Kennedy.

I am preparing a bill to be filed by Mrs. Dewey, as heir-at-law of Mrs. Kennedy, for the construction of the will, to which you and your brothers and sisters must be made parties defendant, as
801 the next of kin to Mrs. Kennedy. I am not advised whether you intend to contest Mrs. Dewey's right to this surplus fund, but before proceeding in the matter it will be conferring a favor upon me if you will call upon me at my office, or permit me to call upon you at some time which may be mutually convenient, in order that I may set before you Mrs. Dewey's claim. I make this request because I am confident that I can convince you not only of the equity but also the legality of my client's position, and because if I succeed in doing so I shall save her and you a great deal of time and expense.

Trusting that you will let me hear from you at your earliest convenience, I am,

Yours very truly, A. Y. BRADLEY.

Dic. C. K."

(*Envelope.*)

"Andrew Y. Bradley,
Attorney and counsellor at law,
No. 340 Indiana avenue,
Washington, D. C.

Wm. B. Todd, Esq.,
1516 *P St., N. W.,*
Washington, D. C.

Postmarked: Washington, D. C., rec'd Apr. 11, 9—p. m. 1902

802 By Mr. Johnson:

Q. I will ask you to state upon whom, if any one, you relied to defeat the tax title of the Kanns. A. I relied upon the executor of the estate.

Q. Who was that? A. Mr. Webb.

Cross examination.

By Mr. Perry:

Q. Mr. Todd, I do not know that you were asked what your profession is. A. Well, I am an attorney at law, but I am not in practice at present.

Q. When were you admitted to the bar of the District of Columbia? A. In the autumn of 1866.

Q. How long were you a practicing member of that bar? A. I suppose ten or twelve years.

Cross examination.

By Mr. DARLINGTON:

Q. Mr. Todd, from whom did you get your understanding of what you call your remote or contingent interest in this property? A. I think the first one that spoke to me about it was John Kennedy.

803 Q. What did he tell you? A. He told me he thought his opinion was that the Todds as he expressed it, would get all the surplus.

Q. Did anybody else talk with you about it? A. No, I think not.

Q. Mr. Cohen gave you no information in regard to your rights in the case? A. Not the slightest.

Q. He never did? A. No, sir.

Q. Have you ever seen his answer in this case? A. No, sir.

Q. Were you or were you not aware that your interest in this property is wholly independent of the question whether it is personalty or real estate? A. Yes, sir.

Q. You are aware of that? A. Yes, sir.

Q. Suppose it is real estate, what interest have you? A. If it is real estate, I suppose it would go to Mrs. Dewey.

Q. You would have no interest whatever? A. No, sir.

Q. You have never been advised by any one to the contrary? A. No, sir.

Q. You knew, did you, that the validity of this tax sale is being tested in this suit? A. Yes, sir.

804 Q. Did anybody tell you that the executor was attacking the tax sale in this suit? A. No one told me so, but I imagine, of course, he would naturally contest it.

Q. It is purely a matter of imagination? A. Yes, sir. I had no conversation with any one on the subject.

Q. You really have not taken any action to protect yourself at all in regard to the tax title? A. No, sir.

Q. And you have no other attorney in the case except Mr. Cohen? A. No, sir.

WILLIAM B. TODD.

Subscribed and sworn to before me this 27th. day of April, 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

The further taking of these depositions was thereupon adjourned subject to notice.

805 WASHINGTON, D. C., *December 23rd*, 1903—3.30 o'clock.

Met pursuant to notice at the office of Wolf & Cohen, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendant, Mr. Johnson.

Present on behalf of the defendant, H. R. Webb, Mr. Perry.

Mr. JOHNSON: I desire to offer in evidence a certified copy of a deed from Phineas Bradley to William A. Bradley and others, recorded in Liber W. B. No. 36, folio 89 *et seq.*, of the land records of the District of Columbia.

The above mentioned deed is in the words and figures following, to wit:—

806 Liber W. B. No. 36, folio 89 *et seq.*

Phineas Bradley to William A. Bradley, trust. Maria T. Gilliss. } Deed recorded 5th May, 1831.

This indenture made the ninth day of November in the year of our Lord one thousand eight hundred and thirty, between Phineas Bradley (between Phineas Bradley) of the city of Washington, and District of Columbia of the one part, and William A. Bradley of the same city and District, of the other part:

Witnesseth, That the said Phineas Bradley for the consideration of five dollars, the consideration, he hereby acknowledges to have received from William A. Bradley, the party of the other part, and for the further consideration of the love, and affection, he bears to his daughter Maria Theresa Gilliss, hath given, granted, bargained and sold, and by these presents the said Phineas Bradley, doth give, grant, bargain and sell, unto him the said William A. Bradley and to his heirs and assigns, forever, all that piece or parcel of ground or land, lying and being in the city of Washington, and described as being lot or part of lots numbered three (3) and four (4) in the square numbered four hundred & thirty-two (432) as marked on the ground plan of the said city, the same being twenty three feet and three inches in front, and bounded on the south, by the Centre Market square, on the west, by the lot and house owned, or lately owned by Richard Ballard, on the north by an alley, running from Sixth, to Seventh street, and on the east, by a lot or parcel of land, owned by the heirs of *of* James M. Varnum, deceased.

To have and to hold the said piece or parcel of ground or land above described, to him the said William A. Bradley, and to
807 his heirs and assigns forever.

In trust nevertheless, to and for the following interest, and purposes, to wit:

1st. The trust to stand seized of the same, to and for the use of the said Phineas Bradley, and to permit him to enjoy the same, and possess it, during the term of his natural life; and after the death of the said Phineas, then in trust, to hold the same, to and for the use of Maria Theresa Gilliss the wife of the Reverend L. I. Gilliss and daughter of the said Phineas Bradley to permit her to enjoy and have the rents, issues and profits of the said land, for and during the lifetime, of the said Levin I. Gilliss her husband, if she should so long live; and in case she should survive her husband, then in trust, to convey to her, in absolute fee simple, and if she should die, before her said husband leaving issue of her body, then in trust to convey the same to such issue, in fee simple; but in case the said Maria Theresa, should die before her said husband, without issue of her body, then in trust to convey the same, to such heir or heirs at law, of the said Maria Theresa, as she by any writing in the nature of a last will and testament, or other writing under her hand and seal, shall direct and appoint, and the said William A. Bradley for himself, his heirs, executors, and administrators, doth promise, covenant to and with the said Phineas Bradley his executors, and administrators, that he will well & truly stand seized of the same or said land, and premises, above described, and that he and his heirs, shall and will execute, and accept and truly and faithfully execute, and perform, the trusts imposed and declared, in and by this
808 indenture, according to the true intent and meaning thereof.

In testimony the said parties to this indenture, have hereunto set their hands and seals on the day and year first above written meaning to convey the house as well as lot in which John B. Holmead lives or occupies.

PHINEAS BRADLEY. [SEAL.]
W. A. BRADLEY. [SEAL.]

Signed, sealed and delivered by the grantor in presence of—the word "said" was interlined by P. Bradley—
JAMES GUY.

DISTRICT OF COLUMBIA, } *To wit:*
County of Washington, }

Be it remembered that on this 9th. day of November one thousand eight hundred & thirty before me chief judge of the United States circuit court for the District of Columbia personally appeared Phineas Bradley the grantor in the foregoing instrument of writing name- and acknowledged the same to be his act & deed for the purposes therein expressed & declared.

W. CRANCH.

DISTRICT OF COLUMBIA,
OFFICE OF THE RECORDER OF DEEDS, *Dec.* 16, 1903.

This is to certify that the foregoing is a true and verified copy of

an instrument as recorded in Liber W. B. No. 36, fol. 89 *et seq.*, one of the land records of the District of Columbia.

R. W. DUTTON,
[SEAL.] *Deputy Recorder of Deeds, Dist. of Col.*

809 Mr. JOHNSON: I also desire to offer in evidence a certified copy of the deed from William A. Bradley to Maria T. Gillis, recorded in Liber J. A. S. No. 205, folio 187 *et seq.*

The above mentioned deed is filed herewith, and is in the words and figures following, to wit:—

810 J. A. S., Liber 205, folio 187 *et seq.*

William A. Bradley to Maria T. Gilliss. } Recorded 6th. October, 1860.

This indenture made this twenty-ninth day of September in the year eighteen hundred and sixty, between William A. Bradley of the city of Washington, District of Columbia, of the first part, and Maria T. Gilliss of the same place, of the second part:

Whereas the late Phineas Bradley by his deed bearing date on the ninth day of November, A. D. 1830 and recorded in Liber W. B. No. 36 fol. 89 *et seq.*, one of the land records for said District of Columbia, conveyed the parcel of land and premises hereinafter particularly described, to said party of the first part upon certain trusts and among others in trust "To hold the same for the use of Maria Theresa Gilliss *the* the wife of the Rev'd Levin J. Gilliss and daughter of the said Phineas Bradley and to permit her to enjoy and have the rents, issues and profits of the said land for and during the lifetime of the said Levin J. Gilliss her husband, if she should so long live and in case she should survive her husband then in trust to convey to her in absolute fee simple." And whereas said Rev'd Levin J. Gilliss has died leaving the said party of the second part surviving him, and whereas said party of the second part desires that said premises should be released and conveyed to her as provided by the terms of the trusts of said deed. Now this indenture witnesseth, that said party of the first part for and in consideration of the premises and the sum of five dollars to him in hand paid by said party of the second part at and before the sealing and delivery of these presents the receipt whereof, is hereby acknowledged has granted, bargained and sold, released, conveyed and confirmed and by these presents does grant, bargain and sell, release, convey
811 and confirm unto said party of the second part her heirs and assigns all that certain parcel of land situate and lying in the city of Washington, District of Columbia, and being those parts of lots numbered three (3) and four (4) of square numbered four hundred and thirty-two (432) as the same are designated and de-

scribed on the plats and plan of said city, contained within the following metes and bounds: Beginning for the same at a point in the south line of said lot numbered three distant forty-eight feet from the south-east corner thereof and running thence west twenty-four feet two inches, thence north to an alley running through said square from 6th street to 7th street, thence east with said alley twenty-four feet two inches to the west line of the part of said lot numbered three (3) formerly owned by the late James Varnum and thence with said line to the place of beginning, the same being the parcel of land and premises heretofore conveyed to said party of the first part by the late Phineas Bradley by a deed bearing date on the 9th day of November, A. D. 1830, and recorded in Liber W. B. No. 36 fol. 86 *et seq.*, one of the land records in and for the District of Columbia with the buildings, rights, privileges and appurtenances thereunto belonging or in any wise appertaining and all the estate, right, and interest of said party of the first part under and by virtue of the deed aforesaid, *to have and to hold* said parcels of land and premises with the appurtenances unto said party of the second part, her heirs and assigns for her and their sole use and benefit.

In testimony whereof said party of the first part has hereunto set his hand and affixed his seal on the day and year first hereinbefore mentioned.

W. A. BRADLEY. [SEAL.]

Signed, sealed & delivered in the presence of—
F. T. MURPHEY.
THOMAS C. DONN.

812 WASHINGTON COUNTY, *To wit:*

We, F. T. Murphey and Thomas C. Donn, justices of the peace in and for the county aforesaid in the District of Columbia, do hereby certify that William A. Bradley a party to a certain deed bearing date on the twenty-ninth day of September, A. D. 1860, and hereto annexed, personally appeared before us at our county aforesaid, the said William A. Bradley being personally well known to us as the person who executed said deed and acknowledged the same to be his act and deed.

Given under our hands and seals this first day of October, A. D. 1860.

F. T. MURPHEY, *J. P.* [SEAL.]
THOMAS C. DONN, *J. P.* [SEAL.]

DISTRICT OF COLUMBIA,
OFFICE OF THE RECORDER OF DEEDS, *Dec.* 16, 1903.

This is to certify that the foregoing is a true and verified copy of an instrument as recorded in Liber J. A. S. 205 fol. 187 *et seq.* one of the land records of the District of Columbia.

R. W. DUTTON,
[SEAL.] *Deputy Recorder of Deeds, Dist. of Col.*

813 It is hereby stipulated, by and between counsel, that there is no record of any deed, judgment or decree in the courts of this District, divesting the title of Maria T. Gillis, in the property in controversy.

SAMUEL T. KALBFUS, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined

By Mr. JOHNSON:

Q. Will you state what your employment is? A. I am assistant assessor.

Q. Of the District of Columbia? A. Yes, sir.

Q. How long have you been engaged in the tax office of the District? A. For about fifteen years.

Q. Are you familiar with the records of the assessment of real estate in that office? A. I am.

Q. I will ask you to state whether or not you have examined the records with a view to seeing in whose name sub-lot A in square 432 has been assessed? A. I have made the examination.

Q. What years did it cover? A. From 1869 to 1902.

Q. I will ask you to state, if you please, in whose name that lot was assessed during those years.

Mr. DARLINGTON: I object to the question as being immaterial, the evidence in this case already showing that Mrs. Gillis died
814 in 1871, and the law requires that the property should be assessed in the name of the owner.

A. I find it assessed in the name of Maria T. Gillis.

Q. During all those years? A. Yes, sir; from 1869 to 1902.

Q. Do those books show whether or not the tax was paid during those years? A. The taxes were all paid. That is, they were paid, as we say, by sale in one year, which was 1898.

Q. Prior to 1898 they were all paid? A. Yes, sir.

No cross examination.

SAMUEL T. KALBFUS.

Subscribed and sworn to before me this day of 25th April, A. D. 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

815 LOUIS A. DENT, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined

By Mr. JOHNSON:

Q. State what office you now hold? A. I am register of wills of the District of Columbia.

Q. How long have you occupied that office? A. Something over four years.

Q. Are you familiar with its records? A. I am.

Q. I will ask you to state whether or not you have examined those records with a view to ascertaining what, if anything, they show with reference to a will of Maria T. Gillis, or administration upon her estate. A. I have.

Q. During what years? A. Covering the entire existence of the office.

Q. What, if anything, is there of record showing a will of Maria T. Gillis? A. Nothing.

Q. Is there any will on file there not recorded? A. There is not.

Q. Is there any record indicating any administration on her estate? A. None.

Q. I wish you would state what, if anything, there is in the records of that office relating to Maria T. Gillis. A. Nothing.

816 Cross examination.

By Mr. DARLINGTON:

Q. I suppose you have no knowledge of any estate left by Mrs. Gillis requiring administration? A. I have not.

LOUIS A. DENT.

Subscribed and sworn to before me this 25th day of April, 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

The further taking of these depositions was thereupon adjourned until Saturday, December 26th, 1903, at 10 o'clock a. m., at the office of the collector of taxes.

817 WASHINGTON, D. C.,
December 26th, 1903—10 o'clock a. m.

Met pursuant to adjournment at the office of the collector of taxes.

Present on behalf of the complainant, Mr. Darlington and Mr. Tobriner.

Present on behalf of the defendant, Mr. Johnson.

Whereupon E. G. DAVIS, a witness of lawful age, called by and on behalf of the defendants, having been first duly sworn, is examined

By Mr. JOHNSON:

Q. I will ask you to state whether you have here, at hand, the report of tax sales made in April, 1899? A. Yes; this (indicating) is the first page of the report of tax sales made in April, 1899.

Q. My question is whether that is the report that was filed. A. That is the report that was filed with the recorder, and from which he is supposed to have taken a copy.

Q. I will ask you to look at this sheet which I now hand you and ask you if that is a correct copy of the first page of the report in question? A. Yes, sir; it is.

Mr. JOHNSON: I offer this paper in evidence.

The above mentioned paper is filed herewith, marked Exhibit E. G. D.—Y, and is in the words and figures following to wit:—

818 EXHIBIT E. G. D. No. Y.

[A true copy of the original on file in this office. E. G. Davis, collector of taxes, D. C.]*

OFFICE OF THE COMMISSIONERS.
DISTRICT OF COLUMBIA,
WASHINGTON, *May* 5, 1899.

We hereby certify that the following exhibit is a true statement of sales of property to individuals at the tax sale, April 12 *to* 19, (*inclusive*) 1899.

All other property delinquent and sold at said sale was bid in by and in the name of the District of Columbia.

JOHN B. WIGHT,
JOHN R. ROSS,
LANSING H. BEACH,
Commissioners of the District of Columbia.

E. G. DAVIS,
Collector of Taxes, D. C.

Washington city, pages 1 to 810, inclusive (parts 1 to 40)
County, non-agricultural 1 to 297, " " 1 to 15)
County agricultural 1 to 48, " " 1 and 2)

Witness:
WILLIAM TINDALL.

E. G. D.

[* Words enclosed in brackets erased in copy.]

Received for record. May 9, A. D. 1899. 2:50 p. m., and recorded in Liber No. 51. No. 2391, fol. 411 *et seq.*, Libers 2419 & 2436, one of the land records of the District of Columbia.

[SEAL.] GEO. F. SCHAYER,
Dep. Recorder.

819 Cross-examination.

By Mr. TOBRINER:

Q. Mr. Davis, I notice that the first page of Exhibit E. G. D.-Y of this volume, bears upon it impressed with a rubber stamp the words "Received for record May 9th, A. D. 1899—2.50 p. m.—and recorded in Liber 2391 at folio 411 *et seq.*, one of the land records of the District of Columbia, signed Geo. F. Schayer, deputy recorder. What does that mean?

Mr. JOHNSON: I object to the question, first, because it is not proper cross-examination, and, secondly, because the language must speak for itself. The witness is not shown to be qualified to interpret it, if it needs any interpretation.

A. I did not stamp those words on there and do not see how I could answer what they mean. I only suppose what they mean.

Q. You testified in reply to Mr. Johnson's question that you filed these papers with the recorder of deeds? A. Yes.

Q. Does this first page show the fact that the papers were filed with the recorder of deeds?

Mr. JOHNSON: I object to that as the page will speak for itself as to what it shows.

A. I file a report every year and we filed this report with the recorder of deeds and took a receipt from him. After they have had it a sufficient time to record it, they return it to us, with a stamp on it similar to the one you see there.

820 Q. They return to you your report? A. Our own report is returned to us and we have those sheets bound, as our permanent record of tax sales.

Q. They are not filed with the recorder in a bound volume? A. No, sir.

Q. They are filed in separate sheets? A. They are filed in separate sheets, and bound afterwards.

Q. When was this report, of which this is the first page, returned to you by the recorder of deeds? A. It would be impossible for me to state that, because there is no specified time for their return. They lie there sometimes for months after they are recorded before we happen to send for them. We generally try to send for them after they are recorded as soon as possible; but sometimes we send over there for them and they are not through, and then, perhaps, when they are through, we do not send for them because it is not convenient or we do not think of it.

Q. Can you tell, by anything in this office, when that report was returned to you by the recorder? A. I do not think there is anything in the office to show when this was returned.

Q. Is there anything to show when the volume was bound up? A. Nothing except the record in the property clerk's office of the time the bill was presented for binding, or something of that kind. That might show very nearly the time.

Q. This was the first occasion on which you had the reports
821 bound in a volume? A. I think it was. I know at one time instead of having it bound we made the record in writing, which was a copy of this, and we kept that in a bound book.

Q. So that you are unable to say whether the report, as filed by you in the recorder's office, was returned to you a month or two months or three months or four months or five months or six months after it reached there? A. Yes; I cannot say positively, but I do not think it was as long as six months.

Mr. TOBRINER: I move to strike out so much of the answer of the witness as gives his impression and thoughts.

Q. You are unable to state what time it was? A. I am unable to state just what time; yes.

Q. How many reports did you make of the tax sale of April 12th to April 19th, inclusive, in 1899? A. How many reports to whom?

Q. How many reports did you file with the recorder of deeds? A. One.

Q. Is this the only one? A. This is the only one.

Q. So that, since you received this original report from the recorder of deeds there has been no report of tax sales for this year on file in the recorder of deeds' office? A. Not of that particular year; no, sir.

Re direct examination.

By Mr. JOHNSON:

Q. Is this the same report as to which you have testified
822 in this case as a witness for the complainant, some time ago? A. Yes, sir.

ELDRED G. DAVIS.

Subscribed and sworn to before me this 25th day of April 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

The further taking of these depositions was thereupon adjourned, subject to notice.

823 *Memoranda.*

For Exhibit H. R. W. No. 4 see page 87.
" " " " " " 26 see
Exhibit H page 22.

| | | |

EXHIBIT COHEN NO. 2.

FOLD OUT IS TOO LARGE TO BE FILMED

THIRD PART:
PAGES 1 TO 12.

The Washington Post.

WASHINGTON, SUNDAY, NOVEMBER 1, 1903.

THIRD PART:
PAGES 1 TO 12.

Announcing for tomorrow S. KANN SONS & Co a fitting celebration of-

THIS STORE'S 10th BIRTHDAY

No Mail or Telephone Orders Filled To-morrow.

NO store in the world ever offered such a comprehensive list of stupendous bargains as will be found on page 9, part 2 of this paper.

"ALWAYS THE BEST OF EVERYTHING FOR THE LEAST MONEY."

Living up to this store motto has made this the chief source of supply for all Washington.

IF you miss the Birthday Souvenir offerings on page 9, part 2, of this paper you will miss the greatest values ever offered at one time anywhere in the world.

THE STORE WHERE VALUES ARE GREATEST ALWAYS.

More persons buy daily in this store than in any store, located in a city of equal size in America

THIS GREAT STORE

1893 1903

824

EXHIBIT COHEN No. 1.

Statement.

No. 619 14th street N. W., Washington, D. C., auditor's office.

Account No. 2851.

Myer Cohen to the Chesapeake and Potomac Telephone Co., Dr., for toll messages account, telephone No. M 298, during the month of September, 1901.

Any error in this statement will be cheerfully corrected upon receipt by the auditor of proper proof.

Date.	From—	To—	At—	Time.	Minutes.		Amount.	Messenger.	Total.
					Day.	Night.			
18	I. L. Cohen	Mrs. Sonneborn	823 @ Balto.	7.21	....	5	25	Firm.	50
30	M. "	S. Kann.....	1393 "	6.44	....	5	25	.....	

P'd Oct. 22/01

Oct. 22, 1901

CHESAPEAKE & POTO. TEL. CO.

(Here follows reproduction of newspaper advertisement marked p. 825.)

826 EXHIBIT COHEN No. 3.

WASHINGTON, D. C., *Oct.* 4, 1901.

Messrs. Wolf & Cohen to the District Title Insurance Company, No. 610 Thirteenth street N. W., Dr.

Special search, lot A, sq. 432..... ..... $5

The District Title Insurance Co.
Paid Oct. 28, 1901.
Of Washington, D. C.
M. T. D.

EXHIBIT COHEN No. 4.

(*Envelope.*)

Andrew Y. Bradley,
Attorney and counsellor at law,
No. 340 Indiana Ave.,
Washington, D. C.

[SEAL.]
[STAMP.]

WM. B. TODD, Esq.,
1516 *P St., N. W.,*
Washington, D. C.

827 *Original Notice to Quit.*

WASHINGTON, D. C., *October 4th*, 1901.

Mrs. Caroline King.

DEAR MADAM: Whereas by a lease made on the 8th day of July 1890, by and between me, Marianne A. B. Kennedy and Henry King, Jr. of premises known as 715 Market space in the city of Washington and District of Columbia, and the appurtenances thereunto belonging and by the renewals thereof made on the 27th day of December, 1892, and on the 8th day of October, 1896, it was covenanted and agreed that the party thereto of the second part, Henry King, Jr., his executors, administrators or assigns should pay the taxes assessed against the premises aforesaid.

And whereas, all the right, title and interest of said Henry King, Jr., in the said lease or in any renewals thereof were assigned and transferred to you, with my knowledge and consent, on the 26th day of August, 1897, by Harry King, administrator of said Henry King, Jr.

And whereas, you have failed to keep the said covenant to pay the taxes aforesaid, I therefore elect and declare that the said lease has ceased and determined and is utterly null and void.

And I hereby notify you that I am desirous to have again and repossess the aforesaid premises known as 715 Market space in the city of Washington, District of Columbia, which you now hold of me as tenant, and I hereby give you notice to remove from and quit the same at the end of thirty days from the date hereof.

MARIANNE A. B. KENNEDY.

828 *Testimony in Rebuttal.*

Filed June 9, 1904.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } In Equity. No. 22834.

Testimony in Rebuttal.

WASHINGTON, D. C., *June* 4, 1904—3 o'clock p. m.

Met pursuant to agreement at the office of Leon Tobriner, Equity building, Washington, D. C.

Present on behalf of the complainant, Mr. Darlington.

Present on behalf of the defendants Kann and Cohen, Mr. Johnson.

Present on behalf of the defendant H. R. Webb, Mr. Perry.

Whereupon, HARRY KING, a witness of lawful age, called by and on behalf of the complainant, in rebuttal, having been first duly sworn, is examined,

By Mr. DARLINGTON:

Q. You have heard the testimony of Mr. Cohen, in regard to the Kings having induced Mrs. Kennedy to withdraw her consent
829 to some little structure that the Kanns were erecting. You can make, concisely, any statement you desire to make in regard to that matter. A. We objected to the proposed plans of Mrs. Kann to erect a three-story back wall which would have cut off all the light from the rear portion of our store, making it useless from a business point of view; but when Mr. Kann, after some arrangement, modified his plans, we waived our objection. Mr. Kann told me at the time that he would have paid quite considerable money for this concession, and I told him that I was not accepting money in that way; that I had always earned honestly every dollar I had ever made and that I could not take any blood money from anybody at any time. He was very profuse in his thanks, and told me that any time at all he could do me a favor he would be glad to do it, and that I should consider him always a very good friend: that anything, at any time,

he could possibly do for me he would cheerfully do, and the first thing he did was to get his lawyer to buy up a defective tax title and try to dispossess my mother from her place of business.

Mr. JOHNSON: I object to all of the answer of the witness as being incompetent and irrelevant, and as not responsive to any of the testimony offered in chief by or on behalf of the defendant Kann.

By Mr. DARLINGTON:

Q. What objection, other than the objection on the score of shutting off your light, did you make? A. None at all. We
830 only wanted to be protected so far as our light was concerned.

Q. At pages 233 and 234, Mr. Cohen testifies that at one time he offered you $13,000 for your lease. State what the facts are in that connection? A. Mr. Cohen never made me any such offer.

Q. What offer did he make to you? A. He never made me any offer for the lease.

Q. Did he ever approach you with a proposition to buy it? A. Mr. Cohen and I had been very friendly, and Mr. Cohen occasionally used to ask me in reference to the store on Market space. I would invariably tell him that we were perfectly satisfied, and that the lease would not be disposed of so long as we were doing well down there.

Q. What sum of money, if any, was ever mentioned between you as the price of the lease? A. No sum of money was ever mentioned. It never got that far.

Q. Mr. Cohen has testified to some bill of yours which you settled at his office at 50 cents on the dollar. It was a bill of Myer Jonasson & Company. A. That was a bill of Myer Jonasson & Company which Mr. Cohen had for collection against the estate of my father. Mr. Cohen sent me word that he had this bill and he could settle it at 50 cents on the dollar. I settled with Mr. Cohen on that basis, and the same night I sent the other 50 cent settlement to Myer Jonasson & Company direct, paying 100 cents on the dollar on that claim.

831 Q. Why did you not pay the whole of it to Mr. Cohen? A. My reason was that Myer Jonasson & Company were friends of ours, and I did not want them to pay any larger lawyers' fees for collection than necessary.

Q. It seems to be intimated in the testimony of Mr. Webb that you sought to get a new lease in May, 1901, as an indirect way of getting over the forfeiture for default in the payment of taxes. At the time of the negotiation for the new lease, in 1901, what knowledge, if any, had you of the default in the payment of taxes? A. I had no knowledge of the taxes being in default at that time. My object in going to see Mr. Webb and Mrs. Kennedy was for the real purpose, at first, of purchasing the property, or to secure an option for the purchase of the property. If I was unable to do that, I wanted a

longer lease, because we wanted to protect our rights down there for as long as possible. Mr. Webb offered me a new lease with a five year and a two year renewal, or a two year, and a five year renewal. I told Mr. Webb that would not cover any more time than the present lease, and that unless I could get a lease that would be for a longer period, the lease we had at the present time would answer. Had I, at that time, known anything at all about the taxes being in arrear, I could easily have secured a new lease from Mr. Webb, because he offered to make it

Q. Why did you not take it? A. Because there was no advantage to be gained over the old lease. The new lease he pro-
832 posed ran the same length of time that the old lease did.

Cross examination.

By Mr. JOHNSON:

Q. Mr. King, you knew that there was an agreement between the owners on Market space, by which they mutually restricted their right to build on a certain space in the rear of those structures; did you not? A. Yes, sir.

Q. That is what we have described here as the alley agreement? A. Yes, sir.

Q. And it was an agreement by which Mrs. Kennedy and the other owners along there revoked that restriction and left the parties free to build? A. I do not know what agreement Mrs. Kennedy and the other owners had.

Q. You referred to having endeavored to stop the execution of a certain agreement. Is not the agreement which removed that restriction, the one to which you referred? A. I do not know what agreement Mrs. Kennedy had with the other owners there to remove those restrictions. I knew there was an agreement which would prevent any owner from building back more than one story in the rear of those buildings.

Q. And you knew that the agreement which you attempted to get Mrs. Kennedy not to execute was an agreement to revoke that restriction, did you not? A. I did not want Mrs. Kennedy
833 to give her consent to any agreement that would injure us.

Q. And when you went there you found that she had already signed it; did you not? A. No; I found later on that she had not signed it. I was also informed that the placing of her signature to this paper was not effected until the agreement had been signed by her lawyer, Mr. Webb.

Q. Did you go to see Mr. Webb? A. I saw Mr. Webb in reference to this matter; yes.

Q. Did you not know that she had signed the agreement under the advice of Mr. Webb? A. I did not.

Q. Is it not a fact that after Mrs. Kennedy had signed the agreement revoking the previous restrictions, that you interposed objection to the Kanns building notwithstanding the revocation of the

agreement, and threatened injunction proceedings against their act of building? Can you answer yes or no whether or not that is a fact? A. The question will not permit of a yes or no answer. There are too many various meanings to your question.

Q. Is it not a fact that after Mrs. Kennedy had signed the agreement revoking the previous restrictions, that you interposed objection to the Kanns building notwithstanding the revocation of the agreement, and threatened injunction proceedings against their act of building? Can you answer whether or not that is a fact? A.

What we wanted to do in this matter was to have the back
834 part of our store protected. I did not care if Mr. Kann built eight stories high back there, so long as we could get light enough to do business.

Q. Will you answer the question whether or not you threatened injunction proceedings against the Kanns building there? A. I don't know whether I did or not. I can't say that I did, and I can't say that I did not. I may have, but I don't think I did. I am not sure.

Q. And was it not with reference to that threatened injunction proceedings that the Kanns exhibited to you their plans for the building, and made such modifications in the rear of the premises occupied by you as were satisfactory to you? A. I cannot say what Mr. Kann's actions were in that matter. All my conversation with Mr. Kann was to the effect that if he wanted to build there what I wanted him to do was to make the rear part of our store so that we could have light enough to do business in our store. When Mr. Kann modified his plans and the plans were drawn showing that it would not cut off our light entirely, we were satisfied to have them go ahead, although it did darken our store considerably.

Q. Do you remember going to see Mrs. Kennedy? A. I went to see Mrs. Kennedy.

Q. Do you remember asking her not to sign this agreement? A. I went to see Mrs. Kennedy and asked her not to do anything that would interfere with our light, as her tenants.

Q. And she told you then that she had already signed the
835 agreement? A. I don't remember whether she told me at that time or not.

Q. Did you not, before you went to see her, write a letter to her? A. Yes, sir, I did. I wrote her a letter, asking her not to sign anything that would interfere with us as her tenants in that store.

Q. And after that you went to see her? A. I went to see her afterwards; yes, sir.

Q. Did she not tell you then she had already signed the paper? A. I think she referred me then to Mr. Webb.

Q. Did you see Mr. Webb? A. I did.

Q. And did you not learn that she had signed the paper? A. I learned from Mr. Webb that she had signed the paper; but Mr. Webb informed me that Mrs. Kennedy's signature to that paper was not effective until the agreement was signed.

Q. After that did you not invite Mr. Sigmund Kann to come to see you at Mr. Tobriner's office? Can you answer that question yes or not? A. No, sir; I did not at that time.

Mr. DARLINGTON: You can now make any explanation you desire.

A. I did not invite Mr. Kann to Mr. Tobriner's office until after everything had been arranged and agreed upon as to the
836 change in the rear portion of the building, in order to give us light.

By Mr. JOHNSON:

Q. Was that before or after you went to see Mrs. Kennedy? A. That was after I went to see Mrs. Kennedy.

Q. Do you remember being here in Mr. Tobriner's office with Mr. Tobriner and Mr. Kann when Mr. Tobriner said to Mr. Kann that he had prepared a bill for an injunction and had it there on his table? A. No, I do not remember of any such conversation occurring, and it did not occur, because there was no occasion for it. We had agreed to allow this building to go up because Mr. Kann had assured us that the plans would be so modified they would not interfere with our light.

Q. And as a matter of fact the rear of your building was altered, was it not? A. The rear of our building was altered.

Q. And there was some glass arrangement erected to let in the light? A. Yes; but that does not give us now as much light as we had before, because there is a three-story wall about ten feet in the rear of us, and that space before was entirely vacant and the light could come in there from the second story and the first story below.

Q. Did you have to pay for those alterations? A. No, sir; they were done at the expense of Mr. Kann.

Q. That was a part of the agreement between you and Mr.
837 Kann? A. Yes, sir; that was a part of the arrangement; and I will add this, Mr. Johnson, that I was very fair with Mr. Kann in this transaction. I told him it was not my desire to restrict him from building, and Mr. Kann knew that. Mr. Kann knew that all we wanted, as merchants, was to have our store protected, to give us light to do business. You cannot do business in a dark store. Mr. Kann knew there was nothing that would have been held up against him after his plans were modified. The conversation that took place with reference to his making the statement that he would pay money, and my answer to him, was held in the presence of Mr. Tobriner. That took place at this interview.

HARRY KING.

Subscribed and sworn to before me this 9th day of June, A. D., 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

838 LEON TOBRINER, a witness of lawful age, called by and on behalf of the complainant, in rebuttal, having been first duly sworn, is examined,

By Mr. DARLINGTON:

Q. Do you recall an interview between Mr. Kann, Mr. Harry King and yourself, about which he has just testified? A. Yes; I do recall most of it.

Q. Can you tell us whether anything was said, at that interview, about an injunction bill having been prepared? A. No injunction was spoken of or mentioned, or threatened.

Q. At page 163 of the defendant's testimony something is said by Mr. Cohen about your inquiry as to how an arrangement could be made or what arrangement could be made to enable the Kings to derive some benefit from the forfeiture of their lease, by having a judgment rendered against them in the manner testified to by Mr. Cohen. If *the* desire to make any statement in that regard you may do so. A. Mr. Cohen, beginning at the bottom of page 162 of his testimony and continuing on page 163, said: "At the first interview I think I opened the conversation by saying to him that I had not had any proposition from him for the purchase of the tax certificate and from that we passed on to a general discussion of the matter relating to the King property on Market space. He made a reference to the litigation
839 with the Ohio national bank, and said to me: 'How could we, if we wanted to sell you that lease, turn over the property to you and get any benefit from it ourselves?' Mr. Cohen is testifying with respect to a conversation which he says took place in my office. Mr. Cohen is incorrect in his statement of what I said to him. I did not use the expression: "How could we, if we wanted to sell you that lease, turn over the property to you and get any benefit from it ourselves." I did not use that expression in that conversation, nor in the first conversation which I had with him when I called on him at his office. In the first conversation which I had with him at his office, after he had informed me that he had purchased the tax title for the purpose of enabling him to force the Kings out of the premises and put the Kanns into possession of it, and had advised me that he could easily arrange for a lease with Mrs. Kennedy, I stated to him that I thought he had gone about the matter in the wrong way, that is, by endeavoring to force things. Then I also stated to him that the Kings, if they wanted to assign or sell the lease, were not in a *possession* to do so because their title to the lease had been questioned by the proceedings instituted by the Ohio National Bank against the heirs of Henry King, Jr., which proceedings were still pending. And thereupon it was that he made the suggestion to me about their making a default in the landlord and tenant proceeding instituted against them. I explained to him, in the first interview, that no assignment of the

lease could be made because of the pending litigation; but
840 I did not use that expression or any equivalent expression, either in the first or second interview, nor in any other interview I had with him.

Q. What was Mr. Cohen's suggestion to you about a default judgment in a landlord and tenant proceeding? A. That was, as I have already stated, that a certain sum should be agreed to be paid to them for making the default, which could be left on my desk, and I could find it, and put it where it ought to go.

Q. What is the present status of this Ohio Bank litigation?

Mr. JOHNSON: If this question is designed to elicit some fact within the knowledge of the witness not apparent from the record in that case I do not object to it; but if it is for the purpose of having him state what the status of the case is, I do object to it, as the record of that case is the proper evidence.

A. There has been a final decree in that case disposing of all issues and questions in the case.

LEON TOBRINER.

Subscribed and sworn to before me this 8th day of June, A. D. 1904.

WM. HERBERT SMITH,
Examiner in Chancery.

It is stipulated and agreed, by and between counsel for the respective parties, that in the Ohio National Bank litigation, equity cause 19338, the case has been heard on the bill and answer,
841 without the taking of testimony by either side, and that a decree has been passed for the sale of the assets of Henry King, Jr., which decree does not attempt to include the lease of premises No. 715 Market space.

Because of the necessary absence of Mr. Perry, it is agreed by counsel for the respective parties that each and every question asked in the foregoing depositions shall be considered as having been objected to by him, and each and every answer thereto, when given, shall be considered as having been objected to by him, upon competent grounds, if such there be.

842 *Stipulation as to Payment of Taxes.*

Filed Jun- 30, 1904.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. Equity.

It is hereby stipulated and agreed by and between the respective parties that the following taxes upon parts of lots three (3) and five (5) in square numbered *for* hundred and thirty-two (432) of the city of Washington, District of Columbia, assessed in the name of J. C. and Marianne A. B. Kennedy, were paid by the defendant, Marianne A. B. Kennedy, for the years and on the days, and in the amounts following:

Taxes for the year ending June 30, 1898, paid October 14, 1901..... 89.61
Taxes for the second half of the year ending June 30, 1900, paid October 14, 1901..... 4.30
Taxes for the year ending June 30, 1901, paid October 14, 1901..... 6.65

That the other taxes thereon since the said date were paid by the complainant.

And that the said facts and payments as aforesaid, shall be considered as proven in this cause and as part of the record herein.

J. J. DARLINGTON,
LEON TOBRINER,
Sol'rs for Compl't.
R. ROSS PERRY AND SON,
Att'ys for Def't Webb.

843 *Decree, Appeal, &c.*

Filed Jun- 30, 1904.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
HENRY RANDALL WEBB, Executor, ET AL. } No. 22834. Equity.

This cause coming on for final hearing upon the pleadings and evidence, and having been submitted to the court, it is thereupon this 30th day of June, A. D. 1904, upon the consideration thereof,

adjudged, ordered and decreed that the attempted tax sale of April 13th, A. D. 1899, of sublot A, in square 432, in the city of Washington, in the District of Columbia, the certificate of sale dated the said 13th day of April, A. D. 1899, and the tax deed from Henry B. F. Macfarland, John W. Ross and Lansing H. Beach, Commissioners of the District of Columbia, to Myer Cohen, of October 3rd, A. D. 1901, recorded on the same day, described in the bill, be, and each and every of them hereby is adjudged and decreed to be null and void; further that the defendants Myer Cohen, Sigmund Kann and Louis Kann be and they are hereby permanently restrained and enjoined from setting up any title or claim to the specified property by reason of the said attempted tax sale, the said certificate of sale and the said tax deed issued thereunder.

It is hereby separately adjudged, ordered and decreed as against the defendant Henry Randall Webb, executor of Marianne A. B. Kennedy, and the defendant Maria Gillis Dewey, that upon payment by the complainant, Caroline King, to the defendant Henry Randall Webb, executor as aforesaid, or into the registry
844 of the court, within ten days from the date hereof, of the sum of $142.63, being the amount of the taxes due on the said sublot A, in said square 432, with the accrued penalties, and with interest from the 13th day of April, 1899, and of the further sum of $26.56, with interest from the 14th day of October, 1901, to date of this decree, the said complainant be, and she hereby is, relieved against any forfeiture or attempted forfeiture of her lease, described in the bill, by reason of her omission to pay the second semi-annual instalment of taxes for the fiscal year ending June 30th, A. D. 1898, and that the said Henry Randall Webb, executor as aforesaid, be and he is hereby thereupon restrained and enjoined from setting up any title or claim to the said property or instituting any proceeding to recover the same as against the complainant by reason of the said forfeiture.

It is further adjudged, ordered and decreed that the complainant, Caroline King, pay one-half of the costs of this cause, and that the defendants Myer Cohen, Sigmund Kann and Louis Kann pay the remaining one-half of said costs, and that execution be had against the said complainant, and against the said defendants, respectively, therefor as at law.

And the defendants Myer Cohen, Sigmund Kann and Louis Kann having appealed in open court to the Court of Appeals, from the foregoing decree, and the defendant Henry Randall Webb, executor, severing from his co-defendant Maria Gillis Dewey, and praying a separate appeal to the Court of Appeals from such part of the said decree as is against him, in his said capacity, and requesting the court to fix the amount of their appeal bonds to operate as supersedeas, the amount of said bond of the defendants Cohen, Kann and
845 Kann to so operate is hereby fixed at the sum of one thousand dollars, and the bond of the said Webb at five hundred dollars; and, upon the perfection of the said appeals by the said de-

fendants, or by any of them, it is thereupon further ordered that the receivership heretofore decreed in this cause be, and the same hereby is, continued until the further order of this court.

THOS. H. ANDERSON, *Justice.*

Refusal of Maria G. Dewey to Join in Appeal.

Filed Jul- 7, 1904.

Andrew Y. Bradley, attorney & counsellor at law, Colorado building.

WASHINGTON, D. C., *July 7th*, 1904.

Mr. H. Randall Webb, executor est. M. A. B. Kennedy.

DEAR SIR: I desire to inform you on behalf of my client, Mrs. Maria G. Dewey, that if you appeal from the decree of the supreme court of the District of Columbia, in the case of Caroline King *vs.* Maria G. Dewey, *et al.*, you must do so at your own risk and cost, as Mrs. Dewey declines to sanction such an appeal, and will not consent that any share of the costs and expenses of such appeal be imposed
846 upon her or her interests.

Yours very truly, ANDREW Y. BRADLEY,
Att'y for M. G. Dewey.

(Dic. C. K.)

(*Envelope.*)

Andrew Y. Bradley,
Attorney & counsellor at law,
Colorado building,
Washington, D. C.

Mr. H. RANDALL WEBB,
Executor Est. M. A. B. Kennedy.

847 *Memoranda.*

July 8, 1904.—Supersedeas appeal bond of Louis Kann, Sigmund Kann and Myer Cohen filed.

July 8, 1904.—Supersedeas appeal bond of Henry Randall Webb, executor of Marianne A. B. Kennedy filed.

July 14, 1904.—$211.12 deposited by complainant in compliance with decree of June 30, 1904.

848 *Stipulation as to Record on Appeal.*

Filed Jul- 19, 1904. J. R. Young, Clerk.

In the Supreme Court of the District of Columbia.

CAROLINE KING
vs.
MARIANNE A. B. KENNEDY ET AL. } No. 22834. In Equity.

It is hereby stipulated and agreed by and between the solicitors for the complainant and of the defendants Henry Randall Webb executor, Louis Kann, Sigmund Kann and Myer Cohen, that the transcript of the record on the appeal taken from the decree of June 30th, 1904, to the Court of Appeals of the District of Columbia by the said Henry Randall Webb executor, Louis Kann, Sigmund Kann and Myer Cohen, shall consist of a copy of the printed record heretofore filed in said Court of Appeals in the cause heretofore depending therein and numbered twelve hundred and forty one of the dockets of said Court of Appeals, to which shall be added a copy of the affidavit of Myer Cohen filed herein on April 18th, 1902, and copies of all papers and proceedings had herein in this court subsequent to the first day of August 1902, the complainant, however, not conceding that any of the said affidavits are a part of the record for the purposes of the appeal.

LEON TOBRINER,
Of Counsel for Compl't.
R. ROSS PERRY AND SON,
Att'ys for H. R. Webb.
W. G. JOHNSON,
For Defendants Louis & Sigmund Kann & Myer Cohen

849 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 848, inclusive, comprising two volumes, marked "Volume I" and "Volume II," to be a true and correct transcript of the record, as per stipulation of counsel herein filed, copy of which is made part of this transcript, in cause No. 22,834, in equity, wherein Caroline King is complainant, and Marianne A. B. Kennedy *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19th day of August, A. D. 1904.

J. R. YOUNG, *Clerk*,
By ALF. G. BUHRMAN, *Ass't Cl'k.*

Endorsed on cover: District of Columbia supreme court. No. 1456. Louis Kann *et al.*, appellants, *vs.* Caroline King. And No. 1457. Henry Randall Webb, executor, &c., appellant, *vs.* Caroline King. Court of Appeals, District of Columbia. Filed Aug. 20, 1904. Henry W. Hodges, clerk.

TUESDAY, *February* 14*th*, *A. D.* 1905.

LOUIS KANN, SIGMUND KANN, and MYER COHEN, Appellants, *vs.* CAROLINE KING — No. 1456.

and

HENRY RANDALL WEBB, Executor of Marianne A. B. Kennedy, Appellant, *vs.* CAROLINE KING. — No. 1457.

The argument in the above entitled cause was commenced by Mr. W. G. Johnson, attorney for the appellants in No. 1456, and was continued by Mr. J. J. Darlington, attorney for the appellee.

WEDNESDAY, *February* 15*th*, *A. D.* 1905.

LOUIS KANN, SIGMUND KANN, and MYER COHEN, Appellants, *vs.* CAROLINE KING — No. 1456.

and

HENRY RANDALL WEBB, Executor of Marianne A. B. Kennedy, Appellant, *vs.* CAROLINE KING. — No. 1457.

The argument in the above entitled cause was continued by Mr. J. J. Darlington, attorney for the appellee, and was concluded by Mr. R. Ross Perry, attorney for the appellant in No. 1457.

LOUIS KANN, SIGMUND KANN, and MYER COHEN, Appellants, *vs.* CAROLINE KING — No. 1456.

and

HENRY RANDALL WEBB, Executor of Marianne A. B. Kennedy, Appellant, *vs.* CAROLINE KING. — No. 1457.

Opinion.

(Mr. Justice MORRIS delivered the opinion of the court:)

This case was formerly before this court on an appeal from an interlocutory order awarding an injunction *pendente lite* (*Webb v.*

King, 21 D. C. App. 141); and the facts as then developed by the pleadings, and which have not been greatly, if at all, modified by the testimony that was subsequently taken, were stated in the opinion then rendered and need not be here repeated at length. The cause comes now before us again on appeal from the final decree, wherein the court below found the issues in accordance with the complainant's bill and decreed in accordance with the prayers of that bill.

The complainant, here the appellee, was the lessee of certain demised premises. Through inadvertence or negligence she permitted certain taxes, which by the lease she was required to pay, to remain in arrears and the property to be sold for the payment of such taxes, and a certificate of sale to be issued therefor, and finally a tax deed to be executed and recorded. For this it was sought to forfeit her lease; and she filed her bill in equity to be relieved from the forfeiture; to enjoin the proceedings that had been instituted to dispossess her; to have the tax certificate and the tax deed declared null and void; and to have the holders of them perpetually enjoined and restrained from setting them up. The paramount question in the case is that of the validity of these tax proceedings; and it will simplify the consideration of the other questions that are raised if we first dispose of this one.

But this question we think the Supreme Court of the United States has already determined for us in the cases of *City of Washington v. Pratt*, 8 Wheaton, 681; *Roukendorff v. Taylor*, 4 Pet. 349, and the comparatively recent case of *Marx v. Hawthorn*, 148 U. S. 172.

1. The act of Congress of August 15, 1894 (28 Stat. 282), which was in force at the time of the tax proceedings in question were had, and which is yet in force, provides that "all real property in the District of Columbia, except as hereinafter provided, shall be assessed (for taxation) in the name of the owner, or trustee or trustees of the owner thereof;" that "all undivided real property of a deceased person may be assessed in the name of such deceased person until the same is divided according to law, or has passed into the possession of some other person or persons;" and that "all real property, the ownership of which is unknown, shall be assessed 'owner unknown.'"

The owner of the property involved in the present litigation was, and had been for upwards of twenty-five years, Mrs. Marianne A. B. Kennedy, who had inherited it in the year 1871 from a relative, Maria T. Gillis. On the assessment books of the District the property continued to be assessed in the name of Maria T. Gillis, although she had died in the year just named, and was advertised and sold in her name for default in the payment of taxes in the year 1899.

Now, it is very clear that this assessment did not comply with the requirement of the act of Congress. A deceased person can not be the owner of property in the sense of the law. Especially can not a deceased person continue for twenty-five years after his death to be the owner of property. Assessment and the other requirements

of the tax laws are intended to warn the living owner that his property is being dealt with by the public authorities under their supreme power to divest title in the event of failure to pay the public dues; and that living owner is entitled to the benefit of that warning to its fullest extent and to the most faithful compliance with the provisions of the statute. *City of Washington v. Pratt, supra.* It will not do, therefore, to take a former owner, and continue his name until it suits the public authorities to change the assessment.

Provision is made by the statute, perhaps inadequate provision, for the ascertainment by the taxing officers of the names of the owners of property for this purpose of assessment; for the recorder of deeds and the register of wills are both required to report annually to the tax officers all transfers of real estate recorded in their respective offices. This does not seem to cover the case of devolution of title by descent, except apparently in the case of a division of an estate and the execution of deeds of partition by the several parties in interest; and it is not apparent what steps the taxing officers are to take to ascertain the living owner of property when the former owner has departed this life, and there is perhaps only one heir and no division of the estate. And yet the law specifically requires such ascertainment of ownership, for it specifically provides that the assessment in the name of the deceased person may not be continued beyond the partition of the estate, or until the estate "*has passed into the hands of some other person.*" The new owner is such other person; and the taxing officers must ascertain his identity as best they can, if they would have their proceedings entirely valid and indefeasible. Such is the positive doctrine of the case of *City of Washington v. Pratt.* And the result is that failure to assess in such name is a fatal irregularity, which, as between the true owner and the purchaser at a tax sale or his assignee, is sufficient to vitiate all the subsequent proceedings.

Again, in the act of Congress of February 24, 1898 (30 Stat. 250), which regulates the matter of tax sales in this District, there is a provision that, within twenty days after the last day of sale, the collector of taxes shall file in the office of the recorder of deeds for the District a report in writing in which he shall give a statement of the property sold, the names of the persons to whom it is assessed, the amount of taxes due thereon, the name of the person to whom it has been sold, the amount for which it has been sold, the cost of sale, the date of sale, and the surplus, if any (act of February 28, 1898, sec. 3). The purpose of all this is very plain. It was to give further and explicit notice to the citizen, whose property was affected and was about to be taken from him, to warn him of his danger, and to give ample information as to what was required to be done in order that he might relieve his property from its predicament. Under this act he is entitled to have all the details of the statute strictly complied with; and a failure of such compliance may suffice to vitiate all the subsequent proceedings.

In the present case the collector of taxes filed a report, which, so far as it relates to the property here in controversy, was as follows:

Date.	Property sold.	Items of sale.	Am't sold for.	Purchaser.
April 13	.....	.....	.....	C. H. Wiltsie.
	.....	.....	.....	C. H. Wiltsie.
	Square 432.....	2d half of tax for year 1898.	128 50	Do.
	Sub-lot A & imp'ts....	Penalty.....	14 13	
		Watermain tax.....		
	To whom assessed.	Interest from.....		
		Assessment for		
	Maria T. Gillis.	Interest from.....		
		Advertising.....	1 20	

Now, it is very plain that this report does not comply with the requirements of the law. There is no statement of the amount of taxes due on the property, or of the cost of sale, or perhaps even of the amount for which it was sold. We might conjecture that the third and fourth columns are to be read together, and that the figures in the fourth column, under the head of "Amount sold for," are also intended to indicate the amount of taxes due; but this would be only conjecture, and the statute requires certainty. For many less important defects than this tax sales have been declared void; and it is believed that the universal tendency of decision throughout the States of our Union is that statutory requirements of this character must be strictly pursued in order to divest title. But in view of the decisions in the Supreme Court of the United States already mentioned it is unnecessary to cite further authority.

Various other alleged defects and irregularities have been pointed out in these tax proceedings, but we deem it unnecessary to consider them. The two which have been specified are in our opinion sufficient to vitiate the certificate and the deed that were issued in this case; and we must hold both the certificate and the deed to have been null and void as against the appellee.

2. These instruments being null and void, the matter stands as though they had never been issued—although, of course, they must be regarded as a cloud upon the title to this property, which can be removed in a court of equity; and the situation, therefore, is that there are taxes upon the property in arrears, due and unpaid, for which the lessee is liable, and for the failure to pay which the lessor seeks to enforce a forfeiture of the lease. And the lessee, claiming that her failure to pay at the proper time was the result of inadvertence or misadventure, now offers to pay them, and seeks to be relieved from the forfeiture or threatened forfeiture. This we have already held in our opinion on the former appeal she is entitled to do, if the allegations of her bill are borne out by the testimony in the case.

But the testimony makes it more plain that even the allegations of the bill of complaint did that she is entitled to the relief which she asks. The testimony shows quite conclusively that, while the lease required the annual taxes on the property to be paid by the lessee, yet the invariable custom of the lessor down to the time of the default had been to demand and receive the amount of the taxes from the lessee, and to pay the taxes herself by her own agents. For the taxes of the second half of the year 1898, in connection with which the default occurred, the lessor failed for some reason to make the usual demand for the money wherewith to pay the taxes; and the lessee was in the midst of financial trouble and distress caused by the recent death of her husband, who had been the lessee down to the time of his death. The record shows to us quite plainly that the default of the lessee was excusable under the circumstances; and that no harm would be done to anyone by her relief from the nominal forfeiture which she has incurred.

3. The defense of multifariousness in the bill of complaint is again insisted on as it was at the former hearing. But we think that what we said at the former hearing must suffice to dispose of the objection now. The determination of that question depends upon the inquiry as to whether there was an arrangement, or understanding, or combination, or whatever we may call it, between the defendants to the suit, whereby the tax certificate that had been issued against the property involved in the proceedings was to be acquired and used in the interest of the Kanns to coerce the appellee out of the property and to enable the Kanns to become the possessors or lessees of it. We find no evidence whatever in the record of any fraud or wrongdoing perpetrated by any one concerned. We only find the evidence of a situation created by a keen commercial rivalry and shrewd management, wholly untainted by wrongdoing, but still a situation from which injury is threatened to the complainant's rights of property, and against which she is entitled to be relieved. For that there was an arrangement between the defendants whereby the tax certificate was to be used to oust the complainant from the property, we think is too plain to be reasonably questioned. There was undoubtedly a concurrence of effort for that purpose, perhaps no formal combination or preconcerted action. But it matters not what we call it. The undoubted fact is that there was coöperation between the defendants to use the tax certificate to the detriment of the complainant's rights; and there being such coöperation, the defense of multifariousness can not prevail. The one purpose of the bill is to relieve the complainant from the effect of this tax certificate and of the tax title based upon it.

From what we have said it follows in our opinion that the decree appealed from was right and just, and that it should be affirmed, with costs. And it is so ordered.

Affirmed.

WEDNESDAY, *March 8th, A. D.* 1905.

No. 1456.

LOUIS KANN, SIGMUND KANN, and MYER COHEN, Appellants,
vs.
CAROLINE KING

and

No. 1457.

HENRY RANDALL WEBB, Executor of Marianne A. B. Kennedy, Appellant,
vs.
CAROLINE KING.

} January Term, 1905.

Appeals from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the supreme court of the District of Columbia, on separate appeals, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said supreme court in this cause be, and the same is hereby affirmed with costs.

Per MR. JUSTICE MORRIS.

March 8, 1905.

THURSDAY, *March 9th, A. D.* 1905.

LOUIS KANN, SIGMUND KANN, and MYER COHEN, Appellants,
vs.
CAROLINE KING.

} No. 1456.

On motion of Mr. W. G. Johnson, of counsel for the appellants in the above entitled cause, it is ordered by the court that said appellants be allowed an appeal to the Supreme Court of the United States, and the bond to act as a supersedeas is fixed at the sum of twenty-five hundred dollars.

HENRY RANDALL WEBB, Executor of Marianne A. B. Kennedy, Appellant,
vs.
CAROLINE KING.

} No. 1457.

On motion of Mr. R. Ross Perry, of counsel for the appellant in the above entitled cause, it is ordered by the court that said appellant be allowed an appeal to the Supreme Court of the United States from so much of said decree as is against him in his capacity as executor, as aforesaid, and the bond to act as a supersedeas is fixed at the sum of one thousand dollars.

(*Bond on Appeal.*)

Know all men by these presents, that we, Louis Kann, Sigmund Kann and Myer Cohen, as principals, and the United States Fidelity & Guaranty Co., a corporation of the State of Maryland, as surety, are held and firmly bound unto Caroline King in the full and just sum of twenty-five hundred dollars, to be paid to the said Caroline King, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 11th day of March, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between the above bounden Louis Kann, Sigmund Kann, Myer Cohen and Henry Randall Webb and the said Caroline King a decree was rendered against the said Louis Kann, Sigmund Kann, and Myer Cohen and against the said Henry Randall Webb, and the said Louis Kann, Sigmund Kann and Myer Cohen having prayed and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said Caroline King citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said Louis Kann, Sigmund Kann and Myer Cohen shall prosecute said appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

LOUIS KANN. [SEAL.]
SIGMUND KANN. [SEAL.]
MYER COHEN. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By J. S. SWORMSTEDT, [SEAL.]
Attorney in Fact.

[Seal of the United States Fidelity & Guaranty Co.]

Sealed and delivered in presence of—
CHARLES F. ROBERTS.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

[Endorsed:] No. 1456. Louis Kann, Sigmund Kann, and Myer Cohen, appellants, *vs.* Caroline King Supersedeas bond on appeal to Sup. Ct. U. S. Court of Appeals District of Columbia Filed Mar. 15, 1905 Henry W. Hodges clerk.

THE UNITED STATES OF AMERICA, *ss:*

To Caroline King, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Louis Kann, Sigmund Kann and Myer Cohen, are appellants and you are appellee, to show cause, if any there be, why the decree rendered against the appellants, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 15th day of March, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
J. J. DARLINGTON,
For Appelle-.
March 15, 1905.

[Endorsed:] Court of Appeals, District of Columbia. Filed Mar. 15 1905 Henry W. Hodges, clerk.

(*Bond on Appeal.*)

Know all men by these presents, that we, Henry Randall Webb, executor of Marianne A. B. Kennedy, of the District of Columbia, as principal, and the United States Fidelity and Guaranty Company, a corporation under the laws of Maryland, as surety, are held and firmly bound unto Caroline King, of the same place in the full and just sum of one thousand ($1000.00) dollars, to be paid to the said Caroline King, her certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this tenth day of March, in the year of our Lord one thousand nine hundred and five.

Whereas, lately at a Court of Appeals of the District of Columbia in a suit depending in said court, between the said Webb, executor as aforesaid and the said King a decree was rendered against the said Webb, as executor, as aforesaid and the said Webb, executor as aforesaid having prayed in open court and obtained an appeal to the Supreme Court of the United States to reverse the decree in the aforesaid suit, and a citation directed to the said King citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date thereof;

Now, the condition of the above obligation is such, that if the said

Webb, executor, as aforesaid shall prosecute said appeal to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

HENRY RANDALL WEBB, [SEAL.]
Executor.
THE UNITED STATES FIDELITY & GUARANTY CO., [SEAL.]
By J. S. SWORMSTEDT, [SEAL.]
Attorney in Fact.

[Seal of the United States Fidelity & Guaranty Co.]

Sealed and delivered in the presence of—
LEE B. MOSHER.

Approved by—
SETH SHEPARD,
Chief Justice Court of Appeals of the District of Columbia.

Bond satisfactory.
J. J. DARLINGTON,
For Appellee.

[Endorsed:] No. 1457. Henry Randall Webb, executor &c. *vs.* Caroline King Supersedeas bond upon appeal to Supreme Court of United States. Court of Appeals District of Columbia Filed Mar. 14, 1905 Henry W. Hodges clerk.

UNITED STATES OF AMERICA, *ss:*

To Caroline King, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to an order allowing an appeal, filed in the clerk's office of the Court of Appeals of the District of Columbia, wherein Henry Randall Webb, executor of Marianne A. B. Kennedy, is appellant and you are appellee, to show cause, if any there be, why the decree rendered against the appellant, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Seth Shepard, Chief Justice of the Court of Appeals of the District of Columbia, this 14th day of March, in the year of our Lord one thousand nine hundred and five.

SETH SHEPARD,
Chief Justice of the Court of Appeals of the District of Columbia.

Service accepted.
J. J. DARLINGTON,
Solicitor for Appellee.

[Endorsed :] Court of Appeals, District of Columbia. Filed Mar. 14 1905 Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 496 inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of Louis Kann, Sigmund Kann and Myer Cohen, appellants, *vs.* Caroline King, No. 1456, and Henry Randall Webb, executor of Marianne A. B. Kennedy, appellant, *vs.* Caroline King, No. 1457, January term, 1905, as the same remain upon the files and records of said Court of Appeals.

Seal Court of Appeals, District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the city of Washington, this 15th day of March, A. D. 1905.

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 19,668. District of Columbia Court of Appeals. Term No. 202. Louis Kann, Sigmund Kann, and Myer Cohen, appellants, *vs.* Caroline King. File No. 19,669. Term No. 203. Henry Randall Webb, executor of Marianne A. B. Kennedy, appellant, *vs.* Caroline King. Filed March 16th, 1905. File Nos. 19,668 and 19,669.

In the Court of Appeals of the District of Columbia.

HENRY RANDALL WEBB, Executor, Etc., Appellant,
v.
CAROLINE KING ET AL.

Mr. Justice MORRIS delivered the opinion of the court:

This is an appeal from an interlocutory order of the supreme court of the District of Columbia directing an injunction *pendente lite*.

The bill in the cause was filed by the appellee Caroline King, the lessee and occupant of a certain piece of real estate in the city of Washington, against Marianne A. B. Kennedy, the lessor and owner of the property, and Meyer Cohen, Sigmund Kann and Louis Kann, who had become possessed of some interest or claim in it, to be relieved from an attempted forfeiture of her lease, to have a tax deed procured by Cohen for the benefit of the Kanns declared void, to restrain proceedings instituted by Mrs. Kennedy before a justice of the peace for the possession of the property, and to enjoin all the defendants from setting up any title or claim adverse to her lease. A restraining order was issued on December 4, 1901. On the same day the principal defendant, Marianne A. B. Kennedy, died, leaving a will whereby she constituted the appellant, Henry Randall Webb, as her executor, and directed the payment of some legacies, but made no other disposition of her estate, which is assumed to have descended to the appellee Maria G. Dewey. The will was probated and Webb entered upon his duties as executor. He renewed the proceedings for the dispossession of Mrs. King under the landlord and tenant act.

Thereupon, the appellee, Caroline King, filed a bill of revivor and supplemental bill, and brought in Henry Randall Webb and Maria G. Dewey as parties defendant, and procured a restraning order against the proceedings instituted by Mr. Webb. Thereafter the defendants all filed their several answers, and with the answers were filed numerous exhibits and two affidavits. There was then a hearing upon the motion of the complainant for an injunction *pendente lite*, which was allowed and issued upon the condition that the complainant should file a satisfactory bond. This was done. From the order allowing the injunction Henry Randall Webb, severing from his co-defendants, has appealed. The other defendants have not appealed, and are only before the court as appellees, and not claiming at this time to be heard as to their respective interests.

As this cause must necessarily be remanded to the supreme court of the District for further proceedings therein, whatever may be our decision in regard to the questions involved in the present appeal, since, as the appeal is merely from an interlocutory order, our present decision can not dispose of the litigation; and as all the parties affected by the injunction have not appealed, and it would be manifestly improper for us to prejudge or to prejudice their inter-

ests or the interests of the complainant in the cause as against them; and as the proofs to be hereafter taken may materially alter the conditions, as they now appear, it does not seem to us to be proper at this time to enter into any extended consideration either of the law or of the facts of the case. Of the latter it seems to us to be sufficient to state the following, which are either conceded or not controverted.

On July 8, 1890, Mrs. Kennedy leased to Henry King, the now deceased husband of the appellee Caroline King, the premises in controversy, used for business purposes, for a term of three years. By two subsequent agreements the term was so extended as to expire in 1908. King died on August 15, 1897; his son Harry King became administrator of his estate, and on August 26, 1897, with the written consent of Mrs. Kennedy, sold and transferred the leasehold interest to Caroline King, the widow, who thereafter continued and yet continues to occupy the premises and carry on the same business therein.

The lease was made upon conditions that the rent should be promptly paid; that the property should be used merely as a fancy dry goods store, with such portion for residence as might be required, that the property should not be sublet without consent in writing; that it should be kept in repair; that in each and every year of the continuance of the lease the taxes should be paid; that upon the termination of the lease the property should be surrendered in reasonably good condition, and that the lessee should pay rent at the rate of $200 a month on the last day of each and every month. And it was stipulated that upon the failure of the lessee to perform any of these conditions, the lease should be at an end and the lessor might re-enter upon the property.

All the conditions appear to have been duly performed by the lessee, except that, as she claims, through inadvertence and oversight, and in consequence of her mental distress upon the death of her husband and the perplexed condition in which he had left his affairs, Mrs. King failed to pay the taxes for the second half of the fiscal year ending on June 30, 1898, although thereafter she paid all the subsequently accruing taxes down to the time of the filing of her bill. On April 13, 1899, there was a sale of the property by the tax collector of the District for the unpaid instalment, and it was purchased by a tax speculator from the State of New York for the sum of $143.83, apparently the amount of the unpaid tax, with interest and costs. The purchaser received the usual certificate of purchase; and after the lapse of two years, being the period allowed for redemption, he addressed a note to Mrs. King, in which he called her attention to the matter, and offered to let her redeem the tax certificate on the payment by her to him of $294.31. This sum was deemed too large by Mrs. King. Negotiations by correspondence followed. The holder of the certificate reduced his demand to $272.90; but Mrs. King delayed acceptance of it.

In the meantime she had been advised by some one that the tax sale was illegal and invalid, and Mrs. Kennedy and her counsel, who afterwards became her executor, the present appellant, Mr.

Webb, became aware of the condition of things. About this time an arrangement was entered into between Mrs. Kennedy and the two Kanns, who held the adjacent and surrounding property for their business and who desired to take in also the premises occupied by Mrs. King, that they would lease these premises from Mrs. Kennedy at the increased rental of $300 a month, if she succeeded in regaining possession of them. There was some negotiation between Mr. Webb and the holder of the tax certificate, and there were personal interviews in regard to the matter between Mr. Webb and the appellee, Mr. Meyer Cohen, who was acting as attorney and counsel for the Kanns. Mr. Cohen speedily proceeded to the State of New York, purchased the tax certificate for $500, and procured the issue of a tax deed thereon to himself from the authorities of the District of Columbia, which he now holds. Mrs. King in her bill of complaint alleges that he holds it for the benefit of the Kanns, and her statement in that regard does not seem to be seriously controverted. On October 4, 1901, Mrs. King's counsel called upon Mr. Cohen with an offer to purchase from him the tax title which he had procured and to repay to him all his costs and expense in the premises, but the offer was refused.

Mrs. Kennedy, by her counsel, then notified Mrs. King that she would enforce the forfeiture of the lease for her non-payment of taxes, and immediately commenced proceedings to dispossess her. Thereupon Mrs. King filed the original bill in this cause, and subsequently her bill of revivor and supplemental bill, with the result that, notwithstanding that the answers denied some of the allegations of the bill, the court below, as we have already indicated, granted the injunction *pendente lite* which was prayed by the complainant.

On an appeal from an interlocutory order under the circumstances here stated, we prefer to indicate our conclusions rather than to enter into any extended reasoning on the questions presented for decision. These questions, as we understand them, are these: (1) That the complainant by her long delay in respect of the payment of the taxes and the redemption of the tax certificate has precluded herself from relief in equity; (2) That it is apparent from the answers that the complainant was guilty of other defaults; (3) That a forfeiture for the non-poyment of taxes is not one from which equity will relieve; (4) That the bill is multifarious in bringing in matters other than the controversy between the lessor and the lessee, and involving other rights than those in which the lessor is interested.

1. With reference to the first of these questions, notwithstanding that the complainant in the cause should have found it to be to her best interest not to higgle with the holder of the tax certificate for the comparatively small difference between them, we fail to find, as matter of law at this stage of the case, that there was any such delay or laches on her part as would preclude her from relief in equity. It is evident that her failure to pay the taxes in the first instance was due, as she states, to inadvertence, since she paid all the subsequently accruing taxes down to the time of the filing of her bill. And we

can not hold that her delay in redeeming the tax certificate was wholly unreasonable, in view of the fact that she had been advised that the sale for taxes was invalid.

2. It is argued, in the second place, that, although the complainant alleged in her bill of complaint that she had not been otherwise delinquent, yet the answers denied this and alleged certain other failures by her. But plainly it does not follow from this that an injunction *pendente lite* should not issue. The argument for the appellant proceeds upon the theory that the motion for an injunction *pendente lite* should be determined as though the hearing were upon bill and answer. We think this is an erroneous assumption. It is right and proper, of course, as claimed by counsel, that, upon a motion for an injunction *pendente lite*, the statements of an answer responsive to a bill of complaint and contravening its allegations, should be considered and have due weight, if such answer has then been filed; and yet it does not follow that, at the hearing of such motion, the answer, which at this stage of the case can not be regarded as much more than an affidavit, should be allowed to overcome the sworn statements of the bill of complaint. The application is one addressed to the discretion of the court; and the purpose then is not so much to determine rights as to preserve the existing status until the rights of the parties can definitely be determined, if there is reason to believe that a change of such status would injuriously affect the rights of the complainant. In the effect to be given to an answer at this point, it must be remembered that the complainant has had no opportunity to controvert its averments; and that, if in the hearing of a motion for an injunction *pendente lite* the averments of an answer in denial of the allegations of a bill of complaint are to be taken as true and incontrovertible, there probably never would be or could be a case where an injunction *pendente lite* could properly be issued. Upon this hearing the sworn statements of the answer are entitled to no greater weight than the sworn statements of the bill of complaint; and it is within the sound discretion of the court to grant or withhold the injunction.

3. The burden of the very forcible argument on behalf of the appellant is that a forfeiture for default in the payment of taxes, required under a lease to be paid by the lessee, is not one from which the latter can be relieved by a court of equity. But we fail to be persuaded by the force of this argument. Without entering into a specific consideration of the reasons advanced by counsel or of the authorities cited in support of them, we are of opinion, whatever may have been the rule under different conditions, where perhaps tax laws were different, that where the payment of taxes enters, as it does in the case before us, into the rental consideration of the lease, equity will relieve from forfeiture for the non-payment of taxes equally with forfeiture for the non-payment of rent as such. We find no difference whatever in principle under our laws between a provision in a lease that would require the lessee to pay to the lessor for the use of the property a lump sum that would include the taxes, and a pro-

vision that would require the payment of an equivalent sum, but part of it for rent as such and part for taxes. If the precise amount of taxes payable on property could be ascertained in advance for each and all the years of the terms of a lease, we presume there would rarely or never be any provision in a lease for their payment by a lessee. The lessor would prefer to pay them himself, and to add them to the amount of the ordinary rent. It is the uncertainty as to their amount in successive years that is the principal, if not the only reason for these specific covenants for their payment by the lessee, to whom the risk of the uncertainty is thereby transferred. But, whatever be the reason for the insertion of the covenant in leases intended to run for a number of years, it is very plain that in most, if not all, of such leases the payment of taxes by the lessee is part of the rental consideration; and there is no good reason why a forfeiture for the non-payment of this part of the consideration should not be relieved against in equity as much as a forfeiture for non-payment of the part specifically called rent, in regard to which there is no question as to the power of a court of equity to relieve in proper cases.

It is urged, however, that the danger of the loss of the title by the lessor as a consequence of the failure of the lessee to pay the taxes which he has covenanted to pay, should take this covenant or agreement out of the category of those with reference to which a court of equity will give relief. But we find nothing in our law that would warrant this distinction. The statute law of the District of Columbia allows ample time for the payment of overdue taxes, with only a reasonable penalty attached; and it allows two years for the redemption of property from sales made for non-payment. During all this time it behooves lessors as well as lessees to be vigilant. A lessor does not escape the duty of viligance, which is no very difficult duty, to see that the taxes on his property are paid, when by agreement he has shifted the burden of payment from himself to the lessee, as between themselves. It is not more difficult for him to make inquiry in this regard for the purpose of preventing a forfeiture than it is to make similar inquiry for the purpose of enforcing a forfeiture. With proper vigilance the only risk to be incurred is at the utmost only the addition of a pecuniary penalty to the amount of the tax.

It is true that in this case a tax deed has actually been issued, and the ultimate mischief has apparently been done. But the position of the appellant in regard to this does not seem to be entirely consistent. Either this tax deed is valid or it is invalid. If it is valid, then the appellant's title to the property is gone, and he has no right to re-enter and dispossess the lessee. If it is not valid, it should interpose no objection to a redemption of the property either by the lessor or the lessee; and the situation is in law as if no tax deed had actually been issued. But the circumstances under which this tax deed was procured are manifestly such as should be investigated by a court of equity. If it was procured, as alleged in the bill of complaint, for the purpose of coercing the lessee to give up the property or to afford the opportunity of ousting her from it, so that the other

parties who are desirous to lease it should be able to consummate their arrangement with the owner for a new lease of the property to themselves, then beyond question a court of equity can grant relief against all the parties, and the tax deed can not be permitted to stand in the way of such equitable relief. If in the course of the investigation it is found that a *bona fide* title is claimed under this tax deed, there is no reason why, if need be, a court of equity could not cause issues to be sent to a court of common law to determine its validity, and retain the cause for further proceedings, when the verdict upon the issues shall have been certified back to it.

4. We do not think that the objection of multifariousness of the bill of complaint, if it be proper for us at this time to consider that question, is tenable under the circumstances stated in the bill. What we have said in regard to the propriety of an investigation of the circumstances under which the tax deed was procured, will apply to this question of multifariousness. If the complainant in the cause, apart from the matter of the tax deed, has the right to be relieved from the forfeiture, as we hold that she has, if her testimony sustains the allegations of her bill; and if, as alleged in the bill, there was an arrangement between the parties other than the complainant, whether entered into in good faith or otherwise, that this tax title should be acquired and it was in fact acquired to further the purpose of ousting the complainant and putting the Kanns in possession of the property as lessees, it is eminently right and proper to join in the suit all the parties to such arrangement, for the arrangement is now the main obstacle interposed by the parties to the relief to which the complainant would otherwise be entitled.

We see no reason to disturb the action of the court below in the premises. In view of all the circumstances of the case, so far as they have been developed, we think that the discretion of the court was properly and wisely exercised in granting the injunction *pendente lite*.

The order appealed from will therefore be affirmed, with costs; and the cause will be remanded to the supreme court of the District of Columbia for further proceedings therein according to law.

And it is so ordered.

In the Supreme Court of the United States, October Term, 1905.

No. 202.

LOUIS KANN ET AL., Appellants,
vs.
CAROLINE KING.

No. 203.

HENRY RANDALL WEBB, Executor, Appellant,
vs.
CAROLINE KING.

Stipulation.

The opinion of the Court of Appeals of the District of Columbia rendered upon the appeal of Webb from the interlocutory order granting an injunction *pendente lite* reported in 21 D. C. Appeals 141 not having been included in the transcript on appeal in the above causes, it is hereby stipulated and agreed between all the parties to said appeals by their respective counsel that the annexed copy of said opinion may be filed herein as part of the transcript of record and by the clerk printed as part of the transcript on appeal.

W. G. JOHNSON,
For the Appellants, Myer Cohen and Louis & Sigmund Kann.
J. J. DARLINGTON,
For Appellee.
R. ROSS PERRY AND SON,
For Webb.

[Endorsed:] In the Supreme Court of the United States. October term 1905. No. 202. Louis Kann, *et al.*, appellants *vs.* Caroline King. No. 203. Henry Randall Webb, executor, appellant *vs.* Caroline King. Stipulation of counsel to include opinion of Court of Appeals in record, and copy of said opinion.

[Endorsed:] File Nos. 19,668 & 19,669. Supreme Court U. S., October term, 1905. Term Nos. 202 & 203. Louis Kann *et al.*, appts., *vs.* Caroline King and Henry Randall Webb, exer., appt., *vs* Caroline King. Stipulation and addition to record. Filed Dec. 26, 1905.

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Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 16

LOUIS KANN ET AL., APPELLANTS,

vs.

CAROLINE KING, APPELLEE.

BRIEF FOR APPELLANTS.

WM. G. JOHNSON,
Counsel for Appellants.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 202.

LOUIS KANN ET AL., APPELLANTS,

vs.

CAROLINE KING, APPELLEE.

BRIEF FOR APPELLANTS.

This is an appeal from a decree of the Court of Appeals of the District of Columbia, rendered on the eighth day of March, 1905 (Rec., p. 492), affirming the final decree in the cause by the Supreme Court of the District of Columbia, entered on the thirtieth day of June, 1904 (Rec., pp. 482–4).

The Principal Issue in the Case.

The controlling issue in this case is one of law concerning the rights of parties under a sealed contract. The contract is a lease for years, on condition, *inter alia*, that the lessee pay the taxes, with right, in the lessor, of reentry for breach of the condition. The lessee broke the condition, the property was sold for the taxes, the lessee failed and refused to redeem, the sale became irredeemable, a tax-deed, made by express terms of statute "prima

facie evidence of a good and perfect title in fee simple," was executed conveying the title to a stranger.

The main question resulting from these facts is: Can a *court of equity deprive the lessor of* this contract right of re-entry at the suit of the tenant, upon the suggestion, in the bill, that the tax deed, though valid on its face, can be annulled through judicial proceedings, because of alleged irregularity in the tax sale, and can a court of equity, by injunction, preserve the possession of the defaulting tenant and restrain the landlord's re-entry, pending a judicial proceeding by the tenant against the tax title, which, if adversely decided, will extinguish the lessor's reversion?

The court below has decided this question in the affirmative, which decision, it is respectfully submitted, is erroneous in law, dangerous in consequences, and tends to imperil the fee simple title of all landlords in this District.

The Record and Proceedings.

The original bill was filed by the appellee, Caroline King, the tenant of the premises in controversy and assignee of the lease thereof, against Mrs. Marianne A. B. Kennedy, the lessor of the premises, and against these appellants, as the parties interested in a tax title to the same.

The principal defendant, Mrs. Kennedy, died the day the bill was filed (Rec., p. 27), and the cause was revived against her executor, Henry Randall Webb, and Mrs. Maria G. Dewey, alleged to be the sole heir at law of Mrs. Kennedy (Rec., pp. 26–29).

The objects of the proceeding, as set forth in the prayers of the original bill, are as follows:

(1) To relieve the complainant, a tenant, from the forfeiture of a lease, admittedly incurred through her failure to pay taxes, as covenanted in the lease.

(2) To enjoin the reversioner from enforcing that forfeiture and from dispossessing the tenant.

(3) To have a tax sale and tax deed of the premises, resulting from the non-payment of the tax by the complainant tenant, decreed, to be null and void.

(4) To enjoin these appellants, Louis and Sigmund Kann and Myer Cohen, from setting up any right or title under such tax sale (Rec., p. 12).

Upon a preliminary hearing an injunction *pendente lite* was granted (Rec., pp. 33, 106), from which the defendant Webb appealed to the Court of Appeals of the District of Columbia (Rec., p. 108), which court affirmed the order (Rec., p. 113).

Thereupon the cause proceeded to hearing on the merits, and a final decree was entered granting all the relief prayed by the bill, and adjudging one-half the costs against the complainant and the other half against these appellants (Rec., pp. 482–3).

From this final decree these appellants and the defendant Webb prosecuted separate appeals to the Court of Appeals of the District of Columbia (Rec., p. 483), the defendant, Mrs. Dewey, declining to join in or prosecute any appeal (Rec., p. 484).

Upon these appeals the Court of Appeals of the District of Columbia affirmed the decree of the Supreme Court of the District of Columbia (Rec., p. 492), and these appellants and the appellant Webb prosecuted separate appeals to this court.

Statement.

The record is very voluminous, but, in the opinion of counsel for these appellants, contains a mass of matters wholly irrelevant to the case made by the pleadings and immaterial to be considered on this appeal.

Counsel for these appellants will, therefore, endeavor,

in this statement, to bring to the attention of the court, in the chronological order of their occurrence, the material facts and events out of which the litigation arises, and with respect to which relief is sought by the bill and was granted by the decrees in the courts below.

The Facts of the Case.

The litigation arises out of the following facts:

In July, 1890, Marianne A. B. Kennedy demised to Henry King, jr., premises No. 715 Market space, in this city, for a term of *three* years, from October 1, 1890, at $2,400 per annum, which term was, by certain renewals or extensions, prolonged for *fifteen* years additional, or until October 1, 1908, without any increase of the rental or other obligations of the lessee (Rec., pp. 13–16).

The property embraced in the lease under the description of "715 Market space" is composed of three parcels of land, namely:

Lot A (the main body of the land) and parts of lot 3 and of lot 5 in square 432, the whole being improved by a single building, the premises known as 715 Market space (Rec., p. 37, plat, Rec., p. 54).

By the terms of the lease it was covenanted on the part of the lessee, *inter alia*, that the lessee should—

> "during the continuance and until the end and determination of the said term, for which the said premises are demised, pay, or cause to be paid, in each and every year thereof, the taxes, general and special, of every character and description assessed against and levied upon the said premises by the authorities of the general or local government" (Rec., p. 14).

This requirement was made a *condition* of the original demise (Rec., pp. 13, 14), and repeated in each renewal (Rec. p. 16).

Lease Assigned—Harry King in Sole Control.

The original lessee died August 15, 1897 (Rec., pp. 2, 155), and on August 26, 1897, the lease of the premises, the stock therein, and the business there conducted were assigned to his widow, Caroline King, the complainant (Rec., pp. 17, 187).

Caroline King, however, had nothing to do with the lease or the business (Rec., pp. 186–191). From August, 1897, till the spring of 1898, Harry King, her son, had charge of the finances (Rec., p. 191). In the spring of 1898 Caroline King and three of her sons formed a partnership as to the business conducted in these premises (Rec., p. 190), of which business the sons, principally Harry King, were the real managers and in entire control (Rec., pp. 153–155, 184, 186, 187, 193, 194).

The business of this firm, actually conducted in the demised premises (715 Market space), was in charge of one of the sons (Rec., pp. 153, 155), and Caroline King was not there (Rec., p. 155). The rent for these premises was paid out of the firm business there conducted, and out of the firm account, by the firm checks (Rec., pp. 195–6).

The payment of the taxes on the demised premises, so far as paid at all, was also made from the funds of this firm by check of the firm (Rec., pp. 169, 179, 279, 280, 284).

This was a matter in the exclusive charge of Harry King, who, the record shows, had had a long and varied experience in the matter of the payment of real estate taxes and of the redemption of real property from tax sales (Rec., pp. 168-9, 170, 171, 183-4, 192-4, 229, 279, 280-4), and he was fully conversant with the requirement under the lease to pay the taxes on this property and with the times when the taxes fell due (Rec., pp. 187-8).

Tenant Makes Six Successive Defaults in Tax Payments—Irredeemable Tax Sale to Wiltsie Results.

From the assignment of the lease, in August, 1897, to October, 1901, the only instalment of taxes which was paid when due was the one accruing due and payable in May, 1901.

Every other tax accruing due during this entire period was either not paid at all or only after it had become in default and subject to penalties, and in some instances by way of redemption after a sale of the property for such default (Rec., pp. 168–9, 170, 187–9, 279–284).

Of the many instalments of taxes not paid was the one for the second half of the year ending June 30, 1898, payable in May, 1898 (Rec., p. 3, pars. 5 and 6 of bill). This default having continued until April, 1899, the principal portion of the property, lot A, was sold for said tax on April 13, 1899, to one Charles H. Wiltsie (Rec., p. 3, par. 6 of bill), and this sale became irredeemable by lapse of time in April, 1901, under the terms of the statute.

A tax sale certificate, made assignable by the statute, was issued to Charles H. Wiltsie on April 25, 1899 (Rec., pp. 17, 18).

Lessor Discovers Facts of Default in Tax Payments and of Irredeemable Tax Sale.

On the 19th or 20th of September, 1901, one Charles H. Knight informed the defendant, Louis Kann, of the tax sale, under the impression that said Kann was the occupant of the property, and said Kann informed Knight he was not the occupant and referred Knight to the defendant Webb as the counsel of the owner, Mrs. Kennedy (Rec., pp. 65, 447–8). Subsequently Kann informed his counsel, defendant Cohen, of Knight's visit and communication, but nothing further was said or done by either the Kanns or Cohen with respect to the tax sale (Rec., pp. 358–9).

At this time Knight was wholly unknown to the defendants, Kann, Cohen, and Webb (Rec., pp. 447–8, 359, 286).

On the 25th of September Knight called upon Webb and informed him of the tax sale (Rec., pp. 286–7), which information Webb verified the next day, the 26th, by an examination of the tax records, and also discovered that the tax sale had become irredeemable by lapse of time (Rec., p. 287). This was Webb's first knowledge of the fact of the tax default and sale (Rec., p. 293).

On the 26th of September, 1901, after his investigation at the tax office, Webb informed his client, Mrs. Kennedy, of the fact of the tax default and sale and of her legal right to terminate the lease, leaving her to decide upon her course of action (Rec., pp. 79, 287, 348–50, 356).

On the 27th of September, 1901, which was a Friday (Rec., p. 287), being about to leave the city and not having previously cautioned his client not to receive rent if she decided to enforce the forfeiture, Webb wrote her to that effect (Rec., pp. 287, 307, 348). He then went to New York (Rec., pp. 287, 348) and returned to his office on Monday morning, September 30, 1901 (Rec., pp. 287, 348), and found there a letter from Mrs. Kennedy, dated Sunday evening (Rec., pp. 287, 307, 308, 348).

That letter concludes thus:

> "You say I must not receive the rent, which he will probably send me by mail on Tuesday morning —but I don't see how I can refuse it unless I know when* I am to get another tenant" (Rec., p. 308).

Lessor Seeks New Tenant—Offers Property to Appellants.

Webb understood this as an instruction from his client to seek another tenant in the place of the Kings (Rec., pp. 80, 308–9, 350), and that same morning called upon

*_Where_ in copy (Rec., p. 95) and so read and understood by defendant Webb (Rec., p. 307).

the defendant Cohen, the counsel of the Kanns, to inquire if the Kanns would rent the property (Rec., p. 287), the Kanns having previously, in June, 1901, intimated a willingness to rent the property at $300 per month (Rec., pp. 287–8, 305–6). At this interview Webb informed Cohen that the Kings had failed to pay the taxes and that the consequent forfeiture of the lease was to be enforced by his client, Mrs. Kennedy (Rec., pp. 311, 360).

Cohen thereafter conferred with his clients by telephone (Rec., p. 360), and about 1 o'clock the same day informed Webb of the Kanns' reply, that they would agree to take the property at the higher rental provided possession were given and their agreement would not be used to compel the Kings to pay a higher rent (Rec., pp. 287, 311–12, 350–1, 360–1).

At this interview Webb, in course of conversation, informed Cohen that Wiltsie was the purchaser at the tax sale and that the sale had become irredeemable by lapse of time (Rec., pp. 95, 360, 361). Cohen then suggested to Webb that he, Webb, buy the tax sale certificate from Wiltsie, to which Webb replied that there was no necessity for his, Webbs', purchasing it, whereupon Cohen jestingly remarked, "I believe I'll buy it," and Webb responded, "Don't do that; don't add that complication," or words to that effect (Rec., pp. 95, 328–9, 360–1). At this time Cohen had no idea of buying the tax sale certificate, and his remark was made entirely in jest (Rec., p. 361).

The same day, about 4.30 p. m., Webb informed his client, Mrs. Kennedy, of the willingness of the Kanns to rent the property upon the terms reported by Cohen, and advised her to enforce the forfeiture (Rec., pp. 288, 311, 348). Mrs. Kennedy acquiesced in this advice, and instructed Webb to inform her physician and friend, Dr. Fry, thereof, and of her decision to enforce the for-

feiture; which instructions Webb carried out that same afternoon (Rec., pp. 80, 324).

Wiltsie Offers to Allow Tenant to Redeem Tax Sale—Tenant Refuses to Redeem.

Between the 24th of July, 1901, and the 30th of September, 1901, other transactions material to be considered had taken place between the Kings and Wiltsie with respect to the tax default, but of which all the defendants were entirely ignorant (Rec., pp. 47, 61, 67, 80, 81).

In July, 1901, after this certificate had become irredeemable under the law, Wiltsie opened negotiations, by correspondence, with Caroline King (Rec., p. 285) seeking to have the tax sale redeemed, which correspondence was taken charge of by Harry King (Rec., pp. 172–176, 183–4), but involved only chaffering over the price and the tax sale was never redeemed (Rec., pp. 173–6, 179–182).

On the 24th of July, 1901, Wiltsie wrote to complainant informing her of his purchase of sublot A, saying, among other things:

> "I am *now entitled to a deed to the property*, but I will *surrender the tax certificate without obtaining a deed* if you will give this matter immediate attention. *Delay will be entirely at your own risk*" (Rec., p. 285).

In a postscript he added the following statement:

> "I am informed that you are interested in the premises *as owner or mortgagee*. If I am wrongly informed I shall esteem it a favor if you will kindly state that fact and *give me the name and address of some interested party*" (Rec., p. 285).

On July 30, 1901, Harry King wrote Wiltsie, merely acknowledging the letter, and saying:

"We are willing to pay a reasonable amount for the redemption of same. Please advise us and oblige" (Rec., p. 273). He then consulted his counsel, Mr. Tobriner, about it (Rec., pp. 172–189), and was advised that the tax sale was invalid and incapable of enforcement (par. 7 of bill, Rec., pp. 4, 172, 184).

On August 1, 1901, Wiltsie replied, offering to surrender the certificate upon payment of $294.31 (Rec., p. 174), to which no response was sent until August 10, 1901, when a clerk of King's wrote to Wiltsie, merely announcing that Harry King was out of town and the matter would be brought to his attention on the following Monday [August 12] (Rec., p. 174).

On September 17, 1901, Wiltsie wrote, acknowledging the letter of August 10, and saying, "I have heard nothing further with reference to the matter" (Rec., p. 175). On September 21, 1901, Harry King wrote to Wiltsie, offering to redeem the tax sale at a reduction of $50 from Wiltsie's price (Rec., p. 55), and on the 24th of September, 1901, Wiltsie's clerk wrote offering to settle at a reduction of $25, concluding thus:

> "Believing that you will accept this offer, I have today sent these papers to the Central National Bank of Washington, with receipt on you for $272.90, where they will be open to your examination, and payment can be made. Please call at the bank *upon receipt of this letter and take up the papers promptly*" (Rec., pp. 175–6).

King did not reply to this letter nor do anything in pursuance of it (Rec., p. 176) until October 2, 1901, *after* he received Mrs. Kennedy's letter of the 1st, notifying him that she had terminated the lease because of the Kings' failure to pay the taxes and of their allowing the property to be sold at tax sale (Rec., p. 177).

He then attempted to take up the tax sale certificate by payment at the bank, but it was too late, as the certificate had been returned to Wiltsie the day before (Rec., p. 179).

Lessor Decides to Re-enter—Gives Notice of Forfeiture to Tenant.

On October 1, 1901, Mrs. Kennedy, in execution of the advice previously given by her counsel, the defendant Webb, wrote and sent her notice to the Kings, refusing the rent sent by the Kings on the 30th of September and announcing the forfeiture of the lease (Rec., pp. 7, 20, 176, 177).

The letter is as follows:

"*1630 R. I. Ave., Oct. 1, 1901.*

"To MRS. H. KING, JR.:

"I have only learned within the last few days that you have forfeited your lease of premises 715 Market space by neglecting to pay the taxes and allowing the property to be twice sold at tax sales.

"The lease being thus vitiated and by advice of my attorney, I must decline receiving any further rental from you.

"For fuller explanation of my action in the matter, I refer you to Mr. H. Randall Webb.

"M. A. B. KENNEDY" (Rec., p. 177).

Upon receipt of this letter, on the morning of October 2, 1901, before banking hours, Harry King consulted his counsel about it (Rec., p. 178), then called upon Webb and after some conversation on the subject asked Webb if he objected to his going to see Mrs. Kennedy. Upon being informed by Webb that he did object and that King must transact his business with him, Webb, King says he told Webb he would go to Mrs. Kennedy and did go to her house and attempt to see her, but she denied herself to him (Rec., pp. 179–80).

On October 4, 1901, Mrs. Kennedy executed and had served upon Caroline King a formal notice to quit and surrender up possession of the property (Rec., pp. 349–350, 353, 474–5).

Appellants Acquire Tax Title From Wiltsie.

In the meantime, upon consideration, the idea of buying the tax sale certificate, which Cohen had, in jest, on September 30, suggested to Webb he would do, impressed Cohen more favorably, and between 3 and 4 o'clock that afternoon he had a conference with the Kanns, in which he suggested that they allow him to buy the tax sale certificate and hold it for their benefit. After consideration of the matter, the Kanns left it to Cohen's discretion to purchase the tax sale certificate or not, agreeing to furnish the necessary funds and to stand by the transaction, should he so decide (Rec., pp. 43, 44, 66, 67, 361, 362).

After leaving Dr. Fry's house whither he had gone, in compliance with Mrs. Kennedy's request, on September 30, (Rec., p. 324) Webb went to his own home, reaching there about 6 o'clock, and found the defendant Cohen and his partner, Adolph G. Wolf, on his doorstep awaiting admission (Rec., pp. 288, 312, 324, 364).

Cohen then informed Webb that he, Cohen, was going that night to Rochester to purchase the tax sale certificate from Wiltsie, saying that they were then dealing at arm's length (Rec., pp. 288, 324). Webb expostulated with him, but Cohen was positive and insisted upon going and executing his project (Rec., pp. 312, 313, 324, 325, 364).

Cohen left by the midnight train, arriving in New York the next morning, October 1, 1901, and reaching Rochester at about 3.20 p. m. the same day (Rec., pp. 366–7).

The first knowledge that defendant Cohen had of the fact that this tax sale certificate had been sent to Washington for redemption or that the Kings had had any

opportunity to redeem it was when he was so informed by Wiltsie, in Rochester, on the afternoon of October 1, 1901 (Rec., pp. 47, 61, 368–9), and these facts were not known to defendant Webb until after the 3d of October, 1901 (Rec., pp. 80–81, 332).

At 2 o'clock p. m. of the same day, October 2, Cohen received at Rochester the tax certificate from Wiltsie's clerk assigned to himself (Rec., pp. 18, 369) and left at 2.30 p. m. for Washington by way of New York City, arriving here the morning of October 3 (Rec., p. 369). The same day a deed was executed by the authorities of the District conveying the property to Cohen and was at once recorded (Rec., pp. 18–20, 370).

Negotiations With Lessor For Compromise—(a) By Tenant as to the Forfeiture—(b) By Appellants as to the Tax Title.

Between the 2d and 8th of October, 1901, the complainant, through her son and counsel, endeavored to effect a compromise settlement with the lessor of the forfeiture incurred by which the forfeiture would be waived and the lease maintained, but without success (Rec., pp. 21, 179–80).

On the 9th of October the defendants Kann, through their counsel, informed the defendant Webb, as counsel for Mrs. Kennedy, of their ownership of the tax title in hostility to her, and offered to compromise the same and surrender the tax title if his client would give them possession of the property under a long lease, for which they would pay a net increase rental of $1,200 per annum over that fixed by the forfeited lease; that otherwise they would stand upon their legal rights under the tax title, which she must attack at her peril (Rec., pp. 291-2, 318, 372).

Webb submitted this proposition to Mrs. Kennedy and

she accepted it, which fact Webb communicated to counsel for the Kanns on the 10th of October (Rec., pp. 319, 320, 326, 373).

Nevertheless, the Kings, through their counsel, made further efforts, principally by correspondence with the defendant Webb, to effect a compromise of the forfeiture of the lease, beginning on the 12th of October (Rec., pp. 22–3) and extending to the 30th of October (Rec., pp. 22, 86–89, 294–5, 428–9). As shown by the correspondence itself, no basis of agreement was reached, and the matter culminated on November 1, 1901, in the withdrawal, by counsel for the Kings, of their previous proposition, the rejection of that tendered by defendant Webb, and their declination to enter into any compromise (Rec., pp. 89–91).

Lessor Brings Suit for Possession—Tenant Files This Suit to Enjoin.

On November 9th Mrs. Kennedy signed and duly executed, before Rutledge Wilson, a notary, the complaint, in a landlord and tenant proceeding, before a justice of the peace, against Caroline King for possession of the leased premises, which was duly filed by defendant Webb, and a summons issued the same day (Rec., pp. 24–5, 349, 353).

The trial of this proceeding was set for the 5th of December, 1901 (Rec., p. 10), and on the 4th of December, 1901, the original bill in this cause was filed by Caroline King against Mrs. Kennedy, the Kanns, and Cohen (Rec., p. 1), and a temporary restraining order issued (Rec., p. 25). On the same day Mrs. Kennedy died (Rec., p. 27), and on March 7, 1902, a bill of revivor was filed reviving the cause against her executor, the defendant Webb, and against Maria Gillis Dewey, alleged to be heir at law (Rec., pp. 26–29). On the 4th of April, 1902, a supplemental bill was filed (Rec., pp. 29–31).

The bill of revivor and the supplemental bill are merely

formal, to meet the requirements of equity practice, and involved no change in the case made by the original bill.

All the defendants answered and the cause came on for hearing on the pleadings, on complainant's motion for injunction *pendente lite*, and on June 28, 1902, an injunction *pendente lite* was granted against the defendant Webb (Rec., p. 106). From this order the defendant Webb appealed (Rec., p. 108), and said order was affirmed on January 20, 1903 (Rec., pp. 112-13). Thereafter the testimony of the parties was taken, and on June 30, 1904, the cause came on for hearing upon the pleadings and evidence, and the final decree was entered, from which separate appeals were prosecuted to the Court of Appeals of the District of Columbia (Rec., pp. 482-4), and upon affirmance there (Rec., p. 492) the separate appeals to this court were taken (Rec., p. 492).

Assignment of Errors.

1. The court erred in not dismissing the complainant's bills for want of equity in the case made by the pleadings and proof.

2. The court erred in relieving the complainant from the forfeiture of the lease incurred by her and in enjoining the defendant Webb, from recovering possession of the real estate in said lease described.

3. The court erred in not dismissing the complainant's bills because of multifariousness.

4. The court erred in decreeing that the tax sale of sublot A in square 432, and the deed conveying said lot to the defendant, Myer Cohen, were null and void, and in enjoining the defendants, Sigmund Kann, Louis Kann, and Myer Cohen, from setting up any title or claim to said lot by reason of said tax sale and deed.

5. The court erred in adjudging that half of the costs of this suit be paid by the defendants, Sigmund Kann, Louis Kann, and Myer Cohen, or any of them.

ARGUMENT.

Before entering upon the discussion of the questions of law and fact arising upon this record, a candid statement of the relation of these appellants to the controversy, as disclosed by the record, is due to the court and, it is believed, will be helpful to a correct understanding of the cause.

Relations of Appellants to the Controversy.

The appellants, Kann, are merchants conducting a large store on Market space, portions of which are in buildings on both sides of the building in controversy, which thus obstructs free communication between different portions of appellants' business properties and breaks the continuity of their front (Rec., pp. 358, 472). For these reasons they have long been desirous to secure possession of this property (Rec., pp. 371, 406–7), but, as the record conclusively shows, they took no steps to that end, and did no act hostile to the interests of lessor or lessee until after they had been informed by counsel for the lessor that the lease had been forfeited, that the tax sale had become irredeemable, that the lessee was to be evicted for breach of the lease, their own tenancy of the premises had been solicited, and the counsel for the lessor had himself declined to acquire the tax sale certificate (Rec., pp. 287–8, 305–6, 311–12, 322–4, 328–9, 360–1, 364).

Reflecting upon this situation, the appellant Cohen, acting as the counsel for his co-appellants, the Kanns, reached the opinion that the ownership of this tax title, without reference to whether it would draw to itself the legal title to the property or not, might nevertheless, in some way, not clearly defined in his own mind, aid his clients in securing possession of the property (Rec., pp. 361–2), and so he advised his clients to authorize the purchase (Rec., p. 362), which they accordingly did (Rec., p. 362).

This was a perfectly lawful act, as the tax sales certificates are made negotiable by the express words of the act of Congress authorizing their issuance.

(30 Stat., 251).

Notwithstanding his lawful right to purchase the tax sale certificate, the action of the appellant Cohen in doing so is made an essential ground for relief in the bill (Rec., pp. 5-6), and one of the bases for relief set forth in the opinions of the court below on the two appeals (Rec., 491, 501-2). And this, although the court in its opinion on the final hearing says (Rec., p. 491):

> "We find *no evidence whatever* in the record *of any fraud or wrong-doing* perpetrated by any one concerned. We only find the evidence of a situation created by a keen commercial rivalry and shrewd management, *wholly untainted by wrong-doing.*"

Having lawfully acquired the tax title in a manner "wholly untainted by wrong-doing," the only use they have ever attempted to make of it was to submit an offer of compromise, in which they agreed to surrender it to the lessor, without expense or litigation, though it is "*prima facie* evidence of a good and perfect title in fee simple," in consideration of a lease of the property at a rental of $1,200 per year more than the lessor was receiving under the forfeited lease (Rec., pp. 291–2, 318, 372).

The lessor was willing to compromise the tax title upon these terms (Rec., pp. 319-20, 326-373); but, by the decree in this cause, the execution of this compromise was prohibited, litigation of the tax title *with the tenant* at the risk of the *landlord* during more than four years compelled, and the tax title adjudged to be invalid.

Of course, these appellants are more directly and immediately injured by that portion of the decree which adjudges the invalidity of their tax title; but they are

equally, though indirectly, injured by the portion of the decree which relieves from and enjoins the forfeiture and prohibits the re-entry of the lessor, because thereby the lessor is prevented from giving a lease to appellants and carrying out the terms of the compromise. For these reasons they appeal from the entire decree.

Conditions Existing When Bill Was Filed.

At this point it seems advisable to invite the attention of the court to certain conditions actually existing at the time the bill was filed and to the admitted facts creating those conditions.

Without characterization or argumentative application, they may be tersely stated thus:

1. The lease demised the term upon the following, among other, express conditions:

> "Fifthly. Upon condition that the said party of the second part [the lessee], his executors, administrators, or assigns, will, during the continuance and until the end and determination of the said term for which the said premises are demised, *pay* or cause to be paid *in each and every year* thereof, *the taxes, general and special, of every character and description*, assessed against and levied upon the said premises by the authorities of the general or local government" (Rec., p. 14).

2. The bill admits and alleges, in the fifth paragraph, that—

> "The instalment of the taxes due upon the said property for the second half of the fiscal year ending June 30th, 1898, and payable in the month of May of that year, were overlooked and left unpaid" (Rec., p. 3).

3. The bill admits and alleges, in the sixth paragraph, that a sale of the property for this unpaid tax had been made to one Wiltsie on the 13th of April, 1899 [the

validity of which sale the bill denies], and that the same, if valid had become irredeemable by lapse of time (Rec., p. 3).

4. The bill admits and alleges in the seventh paragraph that as early as the month of July, 1901, the complainant was given the opportunity, by Wiltsie, to redeem the tax sale, notwithstanding the lapse of time, for a sum considered excessive by complainant, and which she declined, and that as late as September 24, 1901, he offered to allow her to redeem for $272.90, a sum less than double the amount of his outlay, which she also declined (Rec., pp. 3-4).

5. The bill admits and alleges in the eighth paragraph that on the 3d of October, 1901, the authorities of the District executed a tax deed, based upon said tax sale, to Myer Cohen, the assignee of said tax sale from Wiltsie and the said deed was recorded (Rec., pp. 6-7).

6. Section 3 of the act of Congress of February 28, 1898, the statute in force in this District at that time, provided for the execution of such a deed to the purchaser at the tax sale or to his assignee, and provided that such—

> "deed shall be admitted and held to be prima facie evidence of a good and perfect title in fee simple to any property bought at said sale" (30 Stat., 251).

7. On the 1st of October, 1901, the lessor wrote notifying the lessee of her election to forfeit the lease (Rec., p. 177), and on the 4th of the same month executed and had served upon the lessee a formal notice to quit (Rec., pp. 291, 349-50, 353, 474-5).

8. On the 9th of October, 1901, these appellants, through their counsel, offered to compromise the tax title with Mrs. Kennedy by surrendering the same, if she would give them a lease of the property upon an increased

rental (Rec., pp. 291-2, 318, 372), and she, acting under the advice of her counsel, and deeming the terms of compromise satisfactory, accepted the same (Rec., pp. 319-20, 326, 373).

9. The lease in question contains the stipulation that if the lessee or his assignee—

> "shall at any time or times refuse, neglect, *or fail* well and truly to observe, keep, and obey and perform *the aforesaid conditions and every of them* according to their or its true intent and meaning, then at the option or election of the said party of the first part [the lessor] the aforesaid term and every unexpired part thereof, shall instantly cease and determine (anything herein contained to the contrary notwithstanding), and be thereafter utterly null and void and of no effect; and it shall thereupon, at her option and election, be lawful for the said party of the first part into and upon the said demised premises, and into and upon every part thereof, wholly to re-enter and the same to have again, repossess and enjoy as in her first and former estate, as fully as though said demise had never been made" (Rec., p. 15).

10. On the 9th of November, 1901, the lessor, Mrs. Kennedy, instituted proceedings for possession in enforcement of the above provision of the lease (Rec., pp. 24–25).

11. On the 4th of December, 1901, the bill in this case was filed (Rec., p. 1), and upon the same day a temporary restraining order was issued, enjoining the lessor from prosecuting her proceeding for possession (Rec., 25).

So it appears that at the time the bill was filed the lessee had violated the condition of the lease by not paying the tax; that the property had been sold for taxes, and the sale, whether valid or invalid, had become irredeemable by lapse of time; that the lessee was offered a compromise of the tax sale, which she declined; that a tax deed had been executed conveying the land to a stranger, which deed, by law, is *prima facie* evidence of

a perfect title in fee; that a compromise of this tax title was then offered the lessor, which she considered advantageous and did accept; that the lease gave the right of re-entry for the lessee's default, and the lessor was exercising it when stopped by the injunction order.

The proposition in the bill, therefore, which the decree appealed from sustains, is, that the defaulting tenant, whose breach of covenant gave rise to the tax title can, on the suggestion of its invalidity, enjoin the landlord from extinguishing it by satisfactory compromise, and enjoin the forfeiture of the lease, while the tenant, for the preservation of her own estate, litigates the question of the tax title, at the peril of the landlord's title if unsuccessful, and wholly for her own advantage if successful.

I.

THE COMPLAINANT'S CASE IS WITHOUT EQUITY ON THE FACTS.

Inquiry Into Tax Title Irrelevant and Impertinent.

The basic problem in this case, whether the complainant is entitled to relief from the forfeiture incurred, is, of course, primarily, a question between the complainant and defendant Webb, but the relief sought against these appellants is not only incidental and subsidiary to, but ablutely dependent upon, the solution of that problem in complainant's favor. If, upon the case made by the pleadings and evidence, the complainant has not established such an equity as justifies relief from the forfeiture, then, manifestly, the complainant is entitled to no relief against these appellants because of having no property rights affected by their claim.

For this reason counsel for these appellants will endeavor to demonstrate to the court that complainant's

case, on the facts established by the evidence, is wholly without equity, that the allegations of the bill have not been supported, nor the negations of the answers met, and that the first and second errors assigned against the decree are well founded and should be sustained.

If this position of the appellants be correct, then all inquiry into the question of the validity of the tax title becomes irrelevant and impertinent, and the decree should be reversed and the cause remanded, with directions to enter a decree dismissing the bill, thus leaving the reversioner free to extinguish the tax title by purchase under the terms of compromise proposed to and attempted to be carried out by the parties when interrupted by the injunction. Proceeding, then, with the presentation of the complainant's case as made in the record, it is easily demonstrable that the case set up by the allegations of the bill is not established by the record, but, on the contrary, is shown to have had no existence in fact.

The Case as Made by the Pleadings and Proofs.

The bill proceeds upon the theory that the complainant had with great fidelity and diligence observed and performed all the obligations of the lease with a single exception, due to oversight and inadvertence under conditions of peculiar trial and distress; that when this single omission was discovered complainant set about its correction with proper diligence, but was cut off from its completion by the wrongful acquisition of the tax title by the Kanns, under an arrangement with the lessor by which they were to acquire it for the lessor's benefit and merely to obstruct and prevent the complainant's efforts to correct this single omission; that when the lessor correctly understood the situation she was willing to condone the forfeiture, but was prevented by the wrongful acts of the Kanns.

A comparison of these allegations of the bill with the evidence will show how entirely unsupported is this bill.

Allegations of Bill as to Cause of Default Disproved by Complainant's Evidence.

The first allegation in the bill of equitable ground for relief from the legal consequences of an admitted default is that the complainant had—

> "*fully and faithfully* complied with *each and every* of the terms of the said lease with the *single exception* that . . . the taxes due upon said property for the second half of the fiscal year ending June 30, 1898, and payable in the month of May of that year, were *overlooked* and left unpaid" (par. 5 of bill, Rec., p. 3).

The fact is, however, as shown by the evidence adduced in behalf of complainant, that her conduct had been the precise reverse of this allegation. With the single exception of the tax falling due in May, 1901, *default* was made in the payment of *every* instalment of tax falling due from the time of the acquisition of the lease down to the time of this controversy, and in consequence there were *two* sales for taxes of part of the property and one sale of another part (Rec., pp. 168–9, 170, 187–9, 279–284).

It is also alleged in the same paragraph that the pretended "*single*" omission to pay the taxes was occasioned—

> "wholly through oversight and inadvertence, and in part occasioned by the affliction and mental distress suffered by the complainant in consequence of the death of her said husband, added to the perplexity and distraction caused by the unfortunate condition in which his business affairs were found to be after his death" (Rec., p. 3).

The complainant, who makes these and the preceding allegations, in this positive form, under oath, did not testify in the cause, while the testimony of others adduced in her behalf shows them to be untrue.

She had no more to do with the lease or with the payment of taxes or the business of her husband's estate than a mere stranger (Rec., pp. 153-5, 184, 186-191, 195-6), and her son, who had entire charge of the matter, did not fail to pay this tax, or the others which were not paid, for the reasons stated, but failed to do so from sheer and wilful neglect or because it was pecuniarily inconvenient.

His testimony on the subject is as follows:

> Q. And you had it pointedly brought to your attention in December of 1897 that taxes had been due the preceding November that you were bound to pay and which had not been paid? A. Yes, sir.
>
> Q. When May came around what did you do? A. *I did not do anything. I had not charged my mind with it at all* (Rec., p. 187).
>
> Q. You knew you were to keep these taxes paid? A. Yes, sir.
>
> Q. You knew they were payable twice a year? A. Yes, sir.
>
> Q. When November, 1898, came around what did you do about these taxes? A. *I did not do anything for the same reason I stated before.*
>
> Q. When May, 1899, came around what did you do about these taxes? A. *Nothing, for the same reason.*
>
> Q. When November, 1899, came around what did you do about these taxes? A. *Nothing.*
>
> Q. When May, 1900, came around what did you do about these taxes? A. *Nothing at all* (Rec., p. 188).

Can such testimony as this support the above quoted allegations of the bill?

Nor is this all. The wilful disregard of the covenant

of the lease and of the rights of the owner, and that the failure to pay was not "wholly through oversight and inadvertence," is strikingly shown by the conduct of the Kings after Wiltsie called on them, in July, 1901, to redeem the tax sale. In that *first* letter Wiltsie says:

> "I am *now entitled to a deed* to the property; but I will *surrender the tax certificate without obtaining a deed* if you will give this matter immediate attention. *Delay will be entirely at your own risk*" (Rec., p. 285).

In a postscript, Wiltsie adds:

> "I am informed that you are interested in the premises as owner or mortgagee. If I am wrongly informed, I shall esteem it a favor if you will kindly state that fact and *give me the name and address of some interested party*" (Rec., p. 285).

The amount which Wiltsie claimed for redemption of this irredeemable sale was only $100.10 in excess of what it would have cost had the tax sale been redeemable. Instead of paying it and redeeming, as he had done in the cases of his own property from this same Wiltsie (Rec., pp. 183–4, 192–3), he consulted his counsel, Mr. Tobriner, and was advised that that gentleman's opinion was that the tax sale was irregular and could be set aside (Rec., pp. 172, 184), but in such a proceeding that *Mrs. Kennedy must be a party or the use of her name permitted* (Rec., pp. 11, 21).

He did not inform Wiltsie who the owner was, nor that the sale was irregular, nor did he inform Mrs. Kennedy and give her the opportunity to protect herself. He wilfully concealed the facts from her while he chaffered with Wiltsie over a difference of $25 for over two months (Rec., pp. 285, 273, 174–5, 55, 175–6, 179).

Can this be called oversight and inadvertence? And how does it compare with the conduct of the defendant

Kann, who, though he owed no duty to any one in the premises, the instant he was informed by Knight of the fact of the tax sale, sent Knight to the defendant Webb, the counsel of Mrs. Kennedy? (Rec., pp. 65, 447–8.)

It is respectfully submitted that the averments of the fifth paragraph are wholly unsupported by evidence; that the complainant who makes them, but failed to testify, is shown by the evidence in her behalf to have been wholly ignorant of any of the facts stated in it, while the witness called in her behalf to prove the averments has shown them to be wholly unfounded.

Appellants' Acquisition of Tax Title Not Wrongful or Inequitable.

The tax sale certificate was purchased by Cohen from Wiltsie, and a tax title taken in his own name, but the money was furnished by the Kanns, in whose interest and for whose use and benefit it was acquired by him as their counsel (Rec., p. 5).

The allegations of the bill as to this transaction are that—

> "the said Cohen then called upon the said Webb to inform him that he was going on to Rochester to buy the tax title from the said Wiltsie, . . . his said action in so doing being *entirely acquiesced in* by the said Webb, *acting on behalf of the said Kennedy*" (par. 8 of bill, Rec., p. 5).

And again, in the same paragraph—

> "that it *never was contemplated* upon the part of *either the defendant Marianne A. B. Kennedy* or the defendants *Kann* that the said tax certificate should be purchased *for the purpose of using the same adversely to her*, or in any manner to endanger her title to the very valuable property in question; that *an agreement or understanding*, whether expressed or tacit, *existed between them*

that the said tax title should be used *only* in furtherance of the common design to have the complainant's lease forfeited," etc. (Rec., p. 6).

Before proceeding with an analysis of these allegations it is important to recapitulate the facts as they existed at the time to which the allegations refer.

The information by Cohen to Webb, of Cohen's purpose to purchase the tax sale certificate, was given to Webb at 6 o'clock p. m., on September 30, 1901 (Rec., pp. 228, 312, 324, 364).

Ever since the receipt of Wiltsie's letter of July 24, 1901, the complainant had had the opportunity to redeem the tax sale or to notify Mrs. Kennedy of the facts and give her the opportunity to redeem it or to institute proceedings for its contestation; and from the 25th of September, 1901, till the close of banking hours on October 1, 1901, the certificate was in Washington at a bank subject to redemption by the complainant (Rec., pp. 175–6, 254, 368). Of these facts only the Kings were cognizant, none of the defendants having any knowledge thereof (Rec., pp. 47, 61, 368–9, 254, 80–81, 332).

The allegation of the bill, therefore, is, that in this situation, on the evening of September 30, 1901, the lessor, Mrs. Kennedy, through her counsel, Webb, "entirely acquiesced in" Cohen's purchase of the tax title, because "an agreement or understanding" at that time "existed between them," that the tax title, when acquired, should not be used "adversely to her" but "should be used *only* in furtherance of the common design to have the complainant's lease forfeited."

These averments of the bill are categorically denied in the answers of all the defendants (Rec., pp. 45, 46, 67, 68, 80, 81).

It is also shown that the Kanns had no communication with Mrs. Kennedy or any one representing her, and that their counsel had no communication with her or any one

representing her except her counsel Webb (Rec., pp. 323, 325, 326, 352, 370).

It is sufficient, therefore, to refer to the language of the answers of Cohen and Webb to see how squarely the issue was made upon these averments. The defendant Cohen, in his answer, says:

> "The statement in said paragraph that the said Webb, acting in behalf of Mrs. Kennedy, entirely acquiesced in the course of this defendant *is false. The said Webb did not acquiesce in the course of this defendant, but expressly dissented therefrom*" (Rec., p. 45).
>
> "*And this defendant avers that no such agreement or understanding, expressed or tacit,* or anything approaching such an agreement, or which the said Webb or the said Mrs. Kennedy or any other person could by any possibility have supposed or believed constituted or implied any such agreement *ever at any time existed*" (Rec., p. 46).

The defendant Webb, in his answer, says:

> "The statement in said paragraph that this defendant entirely acquiesced in the project and course of said Cohen is *utterly false.* This defendant never, at any time or in any way, acquiesced therein, and so far as he said or did anything with respect thereto he objected to and opposed said Cohen's purpose" (Rec., p. 80).

As to the allegation that an agreement or understanding, expressed or tacit, as to the use to be made of the tax title existed, he further says that it—

> "is *an absolute and unmitigated falsehood, without any shadow of foundation in fact, and that no agreement, arrangement, or understanding, expressed or tacit, or otherwise, of any sort or description, ever existed* between this defendant or his client, Mrs. Kennedy, and any person whomsoever, *with respect to the acquisition and use of said tax certificate,* and each and every

averment, insinuation, or suggestion in the bill of complaint to the effect that any such agreement existed *is false*" (Rec., p. 81).

It may be said that the language of these several denials is more forcible than elegant, but it is submitted that the nature of the accusations which they repelled fully justified, if it did not actually require, the indignant characterization of the accusation, as well as the comprehensive and unqualified denial of its truth.

The only testimony in the record in anywise relevant to the issue made by these allegations of the bill and the denials in the answer is that of the defendants, Cohen and Webb, who, in that testimony, utterly deny the truth of these allegations of the bill (Rec., pp. 288, 302, 312, 313-15, 324-5, 361, 364-5).

The cross-examination of these two defendants, according to the appreciation of counsel for these appellants, appears to involve rather their skill and ability as lawyers, from the standpoint of adverse counsel, and of the accuracy and wisdom of their judgments as to situations presented to them affecting the interests in their respective charges, than as tending to impeach the correctness of their statements of fact, or to elicit any facts not stated by them in their direct examination.

Counsel for these appellants forbears to comment further upon it than to suggest, without intending offense and with all due deference, that unless they were to be impeached as false witnesses most of this cross-examination might well have been omitted, since the court is not concerned with, nor has jurisdiction to pass upon the relative skill, learning, and discretion of counsel for parties in a matter affecting the private rights of property of their respective clients.

But even if the purpose of this cross-examination was to impeach the veracity of the defendants, Cohen and Webb, it is respectfully submitted that there is nothing

in the record which has that effect, that the denials in the answer have not been overcome by proof, and that there is not a scintilla of evidence in the entire record having any tendency to give even *prima facie* support to these allegations of the bill.

There having been, therefore, no understanding or agreement between the lessor, Mrs. Kennedy, either directly or through her counsel Webb, by which Cohen acquired ownership of the tax sale certificate, and it being shown to have been Cohen's independent act, for his own purposes, it is difficult to conceive upon what hypothesis the rightfulness of his purchase can be assailed.

By the terms of the statute authorizing the issuance of the tax sale certificate, the certificate is made assignable without restriction.

The law provides that—

> "Upon the payment of the purchase money the said collector of taxes shall issue to the purchaser a certificate of sale, and if the property shall not be redeemed by the owner or owners thereof within two years from the last day of sale, by payment to the collector of taxes of said District, for the use of the legal holder of the certificate, the amount for which it was sold at such sale and fifteen per centum per annum thereon a deed shall be given by the Commissioners of the District or their successors in office to the purchaser at such tax sale, his heirs or devisees, *or to the assignee of such certificates*, which deed shall be admitted and held to be *prima facie* evidence of a *good and perfect title in fee simple* to any property bought at said sale herein authorized."
>
> Sec. 3, Act of February 28, 1898, 30 Stat., 251.

By the express terms of the statute, the original purchaser may assign the certificate to whom he pleases, and the assignee of the certificate is then entitled to a deed.

To deny such right in the assignee is to repeal the statute and to destroy the obligation of the contract between the District and the purchaser.

The bill of complaint does not deny this plain provision of law, but in the allegations under consideration, in effect, alleges that the purchase by Cohen, being made under the alleged agreement with Mrs. Kennedy, is in legal effect a purchase by her. This, as has been shown, is met by the denials of the answer and not attempted to be supported by evidence.

Charge of Threats, Menaces, Duress, and Undue Influence Practiced by Appellants Unsupported and Disproved.

The next ground of equitable relief alleged in the bill is that the defendant Kennedy desired to waive the forfeiture of the lease, but was prevented from so doing by the wrongful acts of the defendants Kann, who by threats and menaces compelled her to enforce the forfeiture of the lease against her will.

Before entering upon the consideration of the averments of the bill and answers and of the testimony pertinent to this branch of the case, the attention of the court should be recalled to the precedent allegations of the bill constituting the second ground for equitable relief.

By those allegations it is claimed that the original acquisition of the tax title by the Kanns was "*entirely acquiesced in* by the said Webb, *acting on behalf of the said Kennedy*" (Rec., p. 5), in pursuance of "an *agreement* or *understanding*" (Rec., p. 6), which "*existed between them*" (Rec., p. 6), that the Kanns should buy the tax title and that the same "should be used only in furtherance of the common design to have the complainant's lease forfeited" (Rec., p. 6).

Thus the bill alleges two utterly inconsistent and

irreconcilable grounds of relief, namely, that the tax title was acquired in pursuance of an *agreement* to *aid* Mrs. Kennedy in her *voluntary enforcement* of the forfeiture, and also as a *threat* to *compel* her to enforce the forfeiture *against her will.*

In the light of this situation the attention of the court is invited to the allegations and proofs on this third ground of equitable relief, the alleged duress practiced upon the defendant Kennedy.

The twelfth paragraph of the bill is as follows:

> "Thereafter, the defendant, Marianne A. B. Kennedy, becoming more fully informed or advised as to the transaction, was unwilling to proceed further with it; and, *through Doctor Henry D. Fry*, a relative with whom she had consulted about the matter, *she informed this complainant* that she did not consider it desirable or proper to insist upon the forfeiture, and that she was willing to waive the same and to permit the complainant to continue under the terms of the lease, if such arrangement could be affected" (Rec., p. 9).

The answers all put the complainant to proof of this extraordinary averment. The answer of Cohen says:

> "This defendant has no personal knowledge of the facts set forth in the twelfth paragraph of said bill, but he is informed and believes, and therefore avers, that *the said averments of facts are untrue*" (Rec., p. 49).

The defendants Kann in their answer deny all personal knowledge of the averments in this paragraph, and if material demand proof thereof, and add that they are—

> "Informed and believe that *said Dr. Henry D. Fry has unequivocally denied to counsel that he ever made any communication to the complainant of any sort whatsoever with respect to this matter*" (Rec., p. 70).

The answer of the defendant Webb categorically denies the allegations of this paragraph (Rec., 82-3), and adds:

> "This defendant has no personal knowledge of what the said Dr. Fry may have represented to the complainant, but *he is informed by the said Dr. Fry* that he, said Fry, *never informed the complainant anything*, and he was informed *by the said Mrs. Kennedy that she never authorized the said Fry, or any one else, to make any such representations*" (Rec., p. 83).

It is to be observed that the allegations in this twelfth paragraph of the bill are not made upon information and belief, but are positive declarations by the complainant under oath, and the alleged communication from Dr. Fry is not claimed to have been made to her counsel or other intermediary, but directly to herself, the language being that "Marianne A. B. Kennedy, through Dr. Fry, informed *this complainant*," etc. (Rec. p. 9), and after the answers were filed no attempt was made to amend the bill in this or any particular.

The precise date of this alleged occurrence is not stated in the bill, but as the paragraph is introduced by the word "thereafter," and the precedent allegations deal with events between the 8th and 14th of October, 1901, it could not refer to any time anterior to the 14th of October. There is other evidence in the record showing that it could not have occurred prior to the 26th of October.

It appears from the testimony of defendant Webb that on the 15th of October, 1901, Mr. Tobriner, counsel for complainant, called upon defendant Webb, as counsel for Mrs. Kennedy, saying that he would like to have a letter from Mrs. Kennedy to Mrs. King waiving the necessity for a tender of rent (Rec., p. 292). With reference to this Webb says:

> "I told him that it would not be necessary to have such a letter written; that the Kings could send the check, as they had before, and it would

> be returned. He said no; he would not do that; that *he proposed to make a personal tender of the money;* and after some conversation I think I told him I would have the letter written" (Rec., p. 292).

This demand for a letter from Mrs. Kennedy direct to Mrs. King was repeated by Mr. Tobriner in a letter of October 17 (Rec., p. 86), and again in a letter of October 22 (Rec., p. 86).

On the 22d Mrs. Kennedy wrote to Mrs. King, as requested, saying:

> "My counsel, Mr. Webb, informs me that your counsel, Mr. Tobriner, wishes me to write to you directly, stating whether, in the event of your tendering rent to me for the premises, No. 715 Market space, I will accept the same.
>
> "I have, therefore, to say to you, I would not accept the money if offered, as *I do not wish in any way to waive or qualify my notice terminating the tenancy of the premises.*
>
> "By Mr. Tobriner's request I send this to you through that gentleman.
>
> "I am very truly yours,
>
> "MARIANNE A. B. KENNEDY."
>
> (Rec., p. 87.)

Webb also testifies as follows:

> Q. Mr. Webb, what was Mrs. Kennedy's first attitude with respect to the forfeiture of this lease? A. Her first attitude was to enforce the forfeiture of the lease, and *there was no change in her attitude, to my knowledge, until the 26th day of October, 1901* (Rec., p. 431).

There is no evidence that at this time Mrs. Kennedy had become "more fully informed or advised," as alleged in the bill, and the only evidence bearing upon the subject is that Dr. Fry had made certain representations to her which impressed her and led her to a temporary

change of purpose (Rec., pp. 426-427), after which she returned to her original attitude (Rec., pp. 431, 432-450).

Mrs. Kennedy died the same day the bill was filed, and, of course, neither side could take her testimony; but Dr. Fry and the complainant, *the only parties to this alleged transaction, were both in life, and neither was called as a witness* to prove the allegations of this twelfth paragraph.

Among the affidavits filed in the cause for use on the hearing for an injunction *pendente lite* is one by said Dr. Fry (Rec., pp. 103-105), a portion of which is as follows:

> "This affiant *never assumed to represent Mrs. Kennedy as her agent* or to interfere with or control Mr. Webb's advice or his conduct of Mrs. Kennedy's affairs as counsel. This affiant *never had any communication whatever with the complainant, Mrs. King, and never informed her, or any one for her, that Mrs. Kennedy did not consider it proper to insist upon the forfeiture of the lease or that she was willing to waive the forfeiture and permit Mrs. King to continue under the lease. This affiant was never authorized by Mrs. Kennedy to make any such representation to any person*" (Rec., p. 105).

Of course this *ex parte* affidavit is not competent evidence against complainant of the facts stated in it, but the complainant's failure to call Dr. Fry is competent evidence that his testimony, if taken, would have been adverse. The record, therefore, shows that complainant failed to support the allegations of the twelfth paragraph by the evidence of the only two witnesses who could support it, and also shows that one of those witnesses has made a directly contradictory statement, under oath, in this proceeding.

In the thirteenth paragraph of the bill it is alleged that Dr. Fry—

> "*acting as a representative of the defendant,*

Marianne A. B. Kennedy, and at her instance and request, stated to the defendant Cohen, and to additional counsel employed on behalf of the defendants Kann, *the attitude of the defendant Marianne A. B. Kennedy in the matter,* and *her* wish to withdraw from the present scheme of enforcing the forfeiture and of dispossessing the complainant under the circumstances, in favor of the defendants Kann; whereupon the said defendants Kann, through their said counsel, replied that the defendant Marianne A. B. Kennedy must take her choice between fighting the complainant by insisting upon the forfeiture and pursuing the requisite proceeding for dispossessing her, or else that she must fight the defendants Kann for the title to her property, which might be wholly lost to her through their tax deed" (Rec., p. 9).

The correctness of these allegations is put in issue by all the answers (Rec., pp. 49, 70, 83).

The answer of the defendant Cohen says:

"Answering the thirteenth paragraph of said bill, this defendant says that the averments of fact therein contained are untrue; that the said Dr. Fry *was not the representative of Mrs. Kennedy and did not claim to be so to this defendant or to counsel for the defendants Kann in the interview referred to, but on the contrary expressly disclaimed being her representative or having any authority to speak for her or to interfere with the management of her case in the hands of her counsel, Mr. Webb,* and that on said occasion he did not undertake to explain the attitude, wishes, or desires of the said Mrs. Kennedy, but *merely expressed his own views,* which were that his patient was liable to be seriously affected in her health if litigation should ensue, and that he wished to avoid litigation in the premises. . . . Said Dr. Fry was then informed that litigation was inevitable because if the said Mrs. Kennedy did not compromise the tax title with the defendant Cohen, litigation would ensue thereon through

which she might lose her entire estate, and that in order to effect the compromise with said Cohen, it was necessary to enforce a forfeiture of the lease of the complainant" (Rec., p. 49).

The defendant Webb answers thus:

"Answering the thirteenth paragraph of said bill, this defendant denies the facts therein stated and demands strict proof thereof, but he is advised and believes and therefore avers that the same are immaterial to the proceedings in this cause" (Rec., p. 83).

The fourteenth paragraph of the bill alleges that—

"Thereafter, to wit, on the ninth day of November, A. D. 1901, the defendant, Marianne A. B. Kennedy, *under the pressure and menace thus brought to bear upon her*, instituted a landlord and tenant proceeding against the complainant for the possession of the said premises" (Rec., p. 9).

The answers of all the defendants deny this allegation (Rec., pp. 50, 70-71, 83), the defendant Webb, who must certainly have been fully informed of the matter, saying in his answer:

"That she brought the said proceeding *voluntarily* and without coercion, threats, or menaces from any person whomsoever, and that in doing so *she acted under the advice of her counsel and of her friend and physician, Dr. Fry, in whose presence alone she signed the said complaint and to whom she delivered it for delivery to her counsel, this defendant*" (Rec., p. 83).

The substance of these allegations of the thirteenth and fourteenth paragraphs of the bill is this: That Dr. Fry, *acting as a representative* of the defendant, Marianne A. B. Kennedy, and *at her instance and request* informed

counsel for defendants Kann of Mrs. Kennedy's change of purpose; that counsel for Kanns then threatened litigation over the tax title, involving the title to the property, and that, "*under the pressure and menace thus* brought to bear upon her," i. e., by the threats of the Kanns' counsel, not made to her, but made to Dr. Fry, she instituted the landlord and tenant proceeding for possession.

Before considering the evidence pertinent to this part of complainant's case, it is important to notice a fatal omission in the allegations themselves.

It is nowhere averred that this alleged transaction was made known to Mrs. Kennedy in any way, but the alleged duress is confined to a statement made to Dr. Fry, but not alleged to have been communicated to her.

The record shows that there were present on the occasion in question four persons, Dr. Fry, the defendant Webb, the defendant Cohen, and the counsel who signs this brief (Rec., pp. 427, 430). Only two of those persons were sworn as witnesses in the case, the defendants Webb and Cohen. Neither of them testifies that Mrs. Kennedy ever knew that the conference with Dr. Fry had ever taken place, and neither was even asked if Mrs. Kennedy was informed of its occurrence. The whole contention of the bill as to this matter of duress over Mrs. Kennedy rests upon an alleged occurrence *out of her presence, and never brought to her knowledge.* No inference of knowledge on her part can be deduced from the allegation that Dr. Fry, on the occasion in question, was "acting as a representative" of Mrs. Kennedy "at her instance and request" because no attempt was made to prove either of those allegations.

But even had Dr. Fry occupied the relations ascribed to him in the bill, and even had the alleged occurrence been reported to Mrs. Kennedy, the proof shows that it did not have the effect of "pressure or menace," but that

her *subsequent action was hostile to the Kanns and favorable to the Kings.*

The alleged conference took place on the 29th of October (Rec., pp. 427, 430) [not 30th, as alleged in the bill], and, later that day, Webb had a conference with Mrs. Kennedy in which he suggested his purpose to relinquish his position as her counsel, but she urged him to continue to act for her, and, as a result of that conference, he sent a proposition of compromise to counsel for complainant (Rec., p. 431). This proposition, it will be seen, was to waive the breaches of covenant in the lease and forego the forfeiture upon certain conditions for the protection of the lessor, among them that the complainant would, *by judicial proceedings against the Kanns and Cohen, have the tax deed finally adjudicated to be null and void* (Rec., pp. 87, 88, 89).

This proposition was declined by complainant, and all negotiations for compromise ended by a letter from her counsel of November 1, 1901 (Rec., pp. 89-91, 431), and it was not until eight days later, and after Dr. Fry had satisfied himself that the Kings had finally rejected the compromise and that there was no chance of a compromise with the Kings, that the complaint in the landlord and tenant proceeding was executed by Mrs. Kennedy (Rec., p. 431-2). It was signed by her and delivered to Dr. Fry, by whom it was delivered to Webb on November 9, 1901 (Rec., p. 353).

Thus it is seen that this action of Mrs. Kennedy was not in consequence of the "pressure and menace" alleged in the bill, but was the direct consequence of the complainant's final rejection of her offer of compromise and refusal to enter into any compromise with Mrs. Kennedy.

A further important fact to be considered in connection with this interview between the counsel for the Kanns and Dr. Fry is the circumstance of its occurrence. Neither the Kanns nor their counsel sought Dr. Fry or

attempted through him to control the action of Mrs. Kennedy. On the contrary, that interview was brought about at the instance of Dr. Fry and by the express invitation of Mr. Webb, Mrs. Kennedy's counsel (Rec., p. 430). Under such conditions counsel for the Kanns had a clear right to state their position as to the existing controversy.

The bill also alleges something in the nature of a compulsory agreement between the defendants for the enforcement of the forfeiture by Mrs. Kennedy. The ninth paragraph of the bill alleges, upon information and belief, that the defendants now—

> "claim that an agreement existed between them to the effect that if the defendant Kennedy will, by all means in her power, enforce the said forfeiture, and if she succeeds therein, lease the said premises to said defendants Kann, the latter will not seek to enforce the tax title against her, but that if she shall not so insist upon the said forfeiture, then the defendants Kann will set up an adverse title against her" (Rec., p. 7).

The answers of the defendants all deny that such an agreement now exists or ever existed, or that they ever so claimed (Rec., pp. 48, 69, 82).

The answer of the defendants Kann avers that on the 9th of October, 1901, their counsel informed defendant Webb that the tax title would be asserted and enforced against Mrs. Kennedy unless she would give them possession under a long lease at an agreed rental, which was the only condition on which they would compromise their claim of right to the property in fee, and unless she would give such a lease she must defend against the tax deed at her peril. And the answer adds that—

> "These defendants are now at liberty to enforce said tax title, and the defendant Webb is at liberty to resist the same or to institute proceedings for

> the defeat of said tax title as he may be advised; and that there has never been a time when these defendants and the said Kennedy and Webb were not at liberty to proceed each against the other as aforesaid" (Rec., p. 69).

The only testimony in the record which has any bearing upon this branch of the case is that of the defendants, Webb and Cohen, no other witness having testified or been interrogated with respect thereto.

The substance of that testimony is that on the 9th of October, 1901, the counsel who signs this brief was retained by the Kanns (Rec., p. 372); that the whole matter was committed to his control, and that his suggestions and advice were followed (Rec., pp. 409–410); that said counsel thereupon called upon defendant Webb, and in substance informed him of the fact that the tax title was owned by the Kanns; that they would not sell or release it; that in his opinion it was valid and enforceable; that under the statute it was *prima facie* evidence of a good title, and that in a judicial proceeding to defeat it the burden would be on Webb's client to show its invalidity and defeat it; that to contest the tax title would involve his client in litigation, delay, and expense.

Said counsel also stated to said Webb that if his client would give the Kanns a long lease on the property the Kanns would surrender the tax title without contest and without expense to her and pay $300 per month for the property and the taxes thereon; that if Mrs. Kennedy would not accept this proposition the Kanns would insist upon their tax title, and, if litigation ensued and the tax title was sustained, would enforce it against her fee simple title to the property (Rec., pp. 372, 410, 413, 415, 291–2, 318, 319, 320, 321).

From the allegations of the bill and the tenor of the cross-examination of the defendants Cohen and Webb on this subject, it would seem that complainant's counsel

regard this transaction as reprehensible and as being, in some undefined way, an unlawful invasion of the rights of the complainant and the defendant Kennedy, and as placing Mrs Kennedy under duress and compelling her to evict the Kings against her wish.

It is submitted that there was not the slightest impropriety in any of this communication to Webb, and that the same was in all respects a proper and liberal offer of compromise of an impending litigation.

The prominence given to this transaction in the bill and cross-examination of Webb and Cohen justifies its detailed analysis.

The facts of the tax sale and that it was irredeemable and that a tax deed had been executed and recorded were already known to Webb, and there was certainly no impropriety in informing him that the Kanns were the real owners of it. The expression of his opinion as to the validity of the tax title by counsel for these appellants to Webb was but the expression by one lawyer to another of his opinion upon a question of law, which could bind nobody, and as to which Webb was as competent to form an opinion as was the counsel for these appellants. The statement that the tax deed was *prima facie* evidence of a good title in fee was but calling his attention to the language of the statute, while the statement that in a judicial contest of it the burden would be upon Webb's client to show the invalidity of the tax deed, and that litigation over it would involve delay and expense, were but calling his attention to obvious and undeniable elements of the litigation. The statement that in the event that litigation over the tax title should ensue, the Kanns would, if successful, insist upon their title, was nothing more than a declaration that in such a litigation the parties must abide by the judgment —an inevitable consequence of the law—with respect to which no sane person had the right to entertain a contrary expectation.

The tax deed was an actuality of *prima facie* validity, which could only be avoided by voluntary surrender, successful litigation, or by compromise. Under such circumstances counsel for these appellants knows of no principle of law or morals which precluded these appellants from offering a compromise in all respects favorable to their opponent.

In this connection it is important to observe the actual situation of affairs *before* the interview between Webb and the counsel of these appellants took place.

Mrs. Kennedy had, eight days before, in her letter of October 1, refused the rent and notified complainant of her intention to forfeit the lease (Rec., p. 177); five days before, on the 4th of October, she had taken the further legal steps of signing and having served a formal notice to quit (Rec., pp. 349, 350, 474–5), and the complainant had *threatened litigation both as to the forfeiture and as to the tax title, and had also sought to effect a compromise of both*, as shown by complainant's evidence. Thus, Harry King, in his testimony, states that upon receiving Mrs. Kennedy's letter returning the rent and asserting the forfeiture on the 2d of October he called upon Webb (Rec., p. 179); that he told Webb—

> "in that conversation that I wanted him to understand *that we would not waive any of our rights with reference to the lease.* . . . I again told him *there would be no waiving of our rights in the matter of a lease and that we did not propose to consider it a forfeiture.* . . . *I went up to see Mrs. Kennedy* and she denied herself to me on the plea of not being well. Then I came down to see Mr. Tobriner and I told Mr. Tobriner. . . . *I went to see Mr. Tobriner and laid the matter before him*" (Rec., p. 180).

Mr. Tobriner, counsel for complainant, testifies that on the 3d of October, 1901, he conferred with Webb as Mrs. Kennedy's counsel, both on the subject of the tax sale

and of the forfeiture of the lease (Rec., pp. 236–237). Mr. Tobriner states that on that occasion—

> "*I discussed the relationship that had existed between the Kings and Mrs. Kennedy. He told me, however, that Mrs. Kennedy had decided to insist upon a forfeiture of the lease,* and that Mrs. Kennedy might make a new lease to the Kings, but that it would have to be at a greater rental" (Rec., p. 237).

Mr. Tobriner also testifies that on the morning of the 4th of October, 1901, he learned of the record of the tax deed, and thereupon called upon Cohen (Rec., pp. 237-8), and in that interview attempted to effect a compromise with Cohen in behalf of the Kings by which Cohen would surrender the tax title (Rec., pp. 238-9). He further states that in that conversation he told Cohen—

> "that the Kings *would insist upon remaining in possession of the premises and standing on their lease.* I also said to him when I first went there that of course whatever I said to him and whatever he said to me I would use, because *there would in all probability be litigation in the matter*" (Rec., p. 239).

On the 8th of October, 1901, counsel for complainant addressed and sent, directly to Mrs. Kennedy, a letter in which, among other things, they say:

> "We have advised Mrs. King that the sale of the premises for taxes is void. . . .
>
> "*For the purpose of canceling the alleged tax sale* and complying with the conditions of the lease, *Mrs. King asks permission to use your name in instituting and conducting legal proceedings to that end,* hereby offering to pay all costs of such proceedings and to indemnify and protect you by proper bond or undertaking against any liability or loss in the premises.

"Will you be kind enough to advise us by Saturday, the 12th inst., what you will do in the matter" (Rec., p. 21).

Thus it is that on the 2d of October King saw Webb, as Mrs. Kennedy's counsel, sought to effect a compromise, and threatened litigation over the lease, and then attempted to see Mrs. Kennedy for the purpose of a compromise; that on the 3d of October complainant's counsel, Mr. Tobriner, saw Webb and endeavored to compromise the lease matter, and on the 4th saw Cohen and endeavored to compromise the tax title matter, threatening litigation as to both the lease and the tax title, while on the 8th of October counsel for complainant communicated directly with Mrs. Kennedy in writing, seeking to effect a compromise of the forfeiture of the lease, and also seeking her consent to the institution of litigation in her name against these appellants to defeat the tax title. On the 5th of October the Kings sent their agent Cahill to defendant Webb to endeavor to effect a compromise through the medium of a new lease (Rec., p. 291), and negotiations between them were actually progressing to that end up to the 9th of October, 1901 (Rec., pp. 291, 317, 325).

The complainant, through her counsel and agent, not only saw counsel for Mrs. Kennedy and the Kanns, threatening them with litigation and making overtures of compromise, but, thereafter, through counsel, communicated, by letter, directly with defendant Webb's client, Mrs. Kennedy, for the same purpose.

These acts of complainant's counsel are not referred to in criticism, but merely to call to the attention of the court the fact that complainant went much further in attempting to control Mrs. Kennedy's conduct than is alleged against defendants Kann; yet the complainant, in the bill, treats these several acts, done by counsel in her behalf, as the proper pursuit of a lawful right.

The sixteenth paragraph of the bill, however, complains that the acts of these appellants prevented the defendant Kennedy—

> "from waiving the said contract forfeiture and *allowing her and the complainant to adjust the matter amicably without resort to the courts*" (Rec., p. 12).

Upon what principle of law is it that the complainant has an exclusive right to threaten litigation and make overtures of compromise? Had not the defendant Kennedy as much right to "adjust amicably" the matter of the tax title with the Kanns, "without recourse to the courts" as she had with respect to the Kings and the forfeiture of the lease?

The lease of the complainant is, by the admissions of the bill and this resort to equity, forfeited and at an end at law, and could only be revived and sustained by voluntary waiver or recourse to litigation; the tax title of the Kanns is, by statute, *prima facie* valid at law and could only be defeated by voluntary surrender or recourse to litigation. Both were hostile claims, against Mrs. Kennedy, and both founded in and arising solely through the wilful and persistent default of the complainant.

The Kanns owed no duty to the complainant, nor to the defendant Kennedy. They are mere purchasers of a tax sale certificate, arising through complainant's default, and made assignable at law. They had as much right to stand on their tax title or to compromise it as the complainant had to stand on the lease or compromise the forfeiture, and the contention that the action of their counsel in submitting a proposition of compromise with an alternative of litigation to Mrs. Kennedy's counsel was in any respect unlawful or improper is baseless.

Moreover, the evidence conclusively shows that the

proposition made by the counsel for these appellants to the defendant Webb did not operate as a menace or duress upon Mrs. Kennedy. None of these defendants or their counsel communicated or attempted to communicate with Mrs. Kennedy directly, but, on the contrary, carefully confined their conduct to communications by their counsel to the counsel of Mrs. Kennedy (Rec., pp. 323, 325, 326, 352, 370), while the single interview with Dr. Fry, so far as these appellants and their counsel are concerned, was not at their solicitation, but at the instance and invitation of her counsel, Mr. Webb (Rec., pp. 430, 433, 438).

The fact that Mrs. Kennedy had the benefit of the intervention of her own counsel between these appellants and their counsel at all times, and that no attempt was ever made to evade his intervention or to treat or communicate with her directly, would seem a sufficient answer to the suggestion of duress, but there is other evidence in the record which conclusively shows that no duress was accomplished.

The conference between counsel for these appellants and Webb occurred on the 9th of October, 1901, yet *after* that date Webb was in negotiation with the representatives of complainant with a view to compromising with her. Thus, Mr. Tobriner, in his letter of October 22, 1901, says:

> "You also at that time *spoke about the terms of a new lease from Mrs. Kennedy to Mrs. King, and you then said you would also let me know the terms on which Mrs. Kennedy would execute such new lease, assuming that Mrs. King would surrender the old one*" (Rec., p. 86).

Mr. Tobriner had had an interview with Mr. Webb certainly as late as October 15 (Rec., pp. 240, 292).

Thereafter, on October 30, Webb sent a proposition of compromise to the counsel for complainant (Rec., pp. 87-

89) which involved the waiver of the forfeiture, *the complainant's continued possession, and the institution of litigation against these appellants to have their tax title decreed to be invalid* (Rec., pp. 87-89), and this was voluntarily rejected by complainant's counsel in their letter of November 1, 1901, and all terms of compromise definitively declined because, as specifically stated in the letter, of alleged misconduct on the part of Mrs. Kennedy through her counsel (Rec., pp. 89-91).

It is, therefore, conclusively shown by the uncontradicted and only evidence relevant to this feature of the case, that the allegation of the bill that the tax title was—

> "being used as a menace to the defendant Marianne A. B. Kennedy to prevent her from waiving the said contract forfeiture and allowing her and the complainant to adjust the matter amicably without resort to the courts" (Rec., p. 12),

is untrue, and that, on the contrary, negotiations for a compromise between them progressed both before and after the 3d of October and up to November 1, 1901, *without ever reaching an agreement as to terms*, when they were voluntarily terminated by counsel for complainant (Rec., pp. 89–91).

Grounds of Decision by Court Below—Analytical Consideration of Court's Opinions.

When this case was first before the Court of Appeals upon the appeal from the order granting an injunction *pendente lite*, and before any testimony had been taken, the Court of Appeals justified the granting of the injunction upon the ground that the bill charged some wrongful act on the part of the defendants, which, if proved, would justify the court in granting the relief

prayed. The court in its opinion says (Rec., pp. 501–2):

> "But the *circumstances under which this tax deed was procured* are manifestly such as should be investigated by a court of equity. If it was procured, *as alleged in the bill of complaint*, for the purpose of coercing the lessee to give up the property or to afford the opportunity of ousting her from it, so that the other parties who are desirous to lease it should be able to consummate their arrangement with the owner for a new lease of the property to themselves, *then beyond question a court of equity can grant relief against all the parties*, and the tax deed can not be permitted to stand in the way of such equitable relief."

The allegations of the bill, as to the "circumstances under which this tax deed was procured," have already been set forth in detail, followed by the denials in the answers, and specific reference has been given to all the evidence in the record bearing upon the subject, from all of which it is demonstrated that there were no "circumstances" of an unlawful or improper character attending the transaction. At the time of the purchase Wiltsie was the lawful owner of the certificate, with the lawful right, expressly conferred by statute, to sell the same to any person whomsoever, the whole world being his market. Any person could lawfully buy the tax title from him and hold it with all the rights which Wiltsie had under it, and any attempt to impair its use, in the hands of another, by restrictions or limitations which did not apply to it in Wiltsie's hands, would be an impairment of Wiltsie's contract rights, in that it would destroy the unlimited negotiability given to it by the statute of its creation.

This, manifestly, can not lawfully be done. If Wiltsie could have obtained a deed under his tax sale certificate, and could then have lawfully negotiated with the lessor

for its surrender and extinction, then, clearly, his assignees had the same rights, unless they had been guilty of some unlawful conduct in connection with the transaction by which they had destroyed the rights they would otherwise have as such assignees.

That they had done no such act is not only established by the proof, but admitted and found as a fact by the court below, in its opinion on the final hearing, in which it says (Rec., p. 491):

> "We find no evidence whatever in the record of *any fraud* or *wrongdoing* perpetrated by any one concerned."

And the opinion further describes the conduct of these appellants as "*wholly untainted by wrongdoing*" (Rec., 491).

Upon what principle, then, is the complainant's claim to equitable relief founded? The only suggestion in the opinion of the basis of such right is that the tax title is a menace to the complainant's property rights, the court saying that the record disclosed (Rec., p. 491)—

> "A situation from which injury is threatened to the complainant's rights of property and against which she is entitled to be relieved."

But is not the tax title equally a menace to the *lessor's* property rights? If valid, it can not only be the means of defeating the lessee's unexpired term, but can also extinguish the lessor's reversion in fee—a far more serious injury. Has the lessee, by whose default the tax title arose, a paramount right over that of the lessor to undertake the extinction of this tax title for her own advantage, and that, too, after having rejected the opportunity afforded her by Wiltsie between July 24, 1901, and October 1, 1901?

If Wiltsie, during those two months King was chaffering

with him about the price, had offered the surrender of the tax title to the lessor, upon the same terms which he had offered it to the lessee, or upon different terms, can there be any doubt of the lessor's right to accept his offer and to secure the extinguishment of the tax title? And after Wiltsie parted with his tax title had not the lessor the same right to negotiate for and secure its extinction at the hands of Wiltsie's assignee that she would have had if it had remained in Wiltsie's control?

The bill in this case, and the opinions of the court below, appear to proceed upon the theory that she had not and that it was the tenant's paramount privilege to extinguish the tax title in her own time and way, and that if she decided to do so through litigation, which, if unsuccessful, would finally and conclusively establish the tax title instead of defeating it, she had that right, and the landlord could but submit, while any arrangement entered into by the landlord for its certain extinction is invalid, if an element of that arrangement involved the enforcement of the landlord's lawful contract right of re-entry.

Two reasons are suggested by the court below why this extraordinary inequality of rights under the contract should subsist in favor of the lessee. In the opinion on the first appeal the court says (Rec., p. 501):

> "It is urged, however, that the danger of the loss of the title by the lessor as a consequence of the failure of the lessee to pay the taxes which he has covenanted to pay, should take this covenant or agreement out of the category of those with reference to which a court of equity will give relief. But we find nothing in our law that would warrant this distinction. The statute law of the District of Columbia allows ample time for the payment of overdue taxes, with only a reasonable penalty attached; and it allows two years for the redemption of property from sales made for non-payment. *During all this time it behooves lessors*

as well as lessees to be vigilant. A lessor does not escape the duty of vigilance, which is no very difficult duty, to see that the taxes on his property are paid, *when by agreement he has shifted the burden of payment from himself to the lessee, as between themselves.* It is not more difficult for him to make inquiry in this regard for the purpose of preventing a forfeiture than it is to make similar inquiry for the purpose of enforcing a forfeiture. With proper vigilance the only risk to be incurred is at the utmost only the addition of a pecuniary penalty to the amount of the tax.

"It is true that in this case a tax deed has actually been issued, and the ultimate mischief has apparently been done. But the position of the appellant in regard to this does not seem to be entirely consistent. Either this tax deed is valid or it is invalid. If it is valid, then the appellant's title to the property is gone, *and he has no right to re-enter and dispossess the lessee.* If it is not valid, it should interpose no objection to a redemption of the property either by the lessor or the lessee; and the situation is in law as if no tax deed had actually been issued."

These two propositions would seem to establish the principle that for such a breach of contract by the tenant the landlord is remediless. The first borrows from the law of torts and applies to the law of contracts, with even greater force and extent than it has in the law of torts, the doctrine of contributory negligence. According to this decision, notwithstanding the tenants' contract to pay the taxes, the landlord "*does not escape the duty of vigilance,*" and is as much bound to see that the taxes are paid as though the contract had never been made. If, therefore, the landlord neglects, by vigilance, to avert the consequences of the tenant's breach of contract, he loses his remedy of re-entry against the tenant, and if, by vigilance, he does avert the consequence of an irredeemable tax sale, then no irreparable injury is done,

and the tenant is entitled to relief from the forfeiture.

If this be correct the reservation of the right of reentry for condition broken is but a barren pretense instead of a valuable remedial right.

The importance of this question, it is submitted, as a proposition of general law, far outweighs the private interests of the parties to this cause and merits careful consideration by this court.

Tenant's Default Not the Result of Mistake or Accident.

The default in this case, relief from the consequences of which is sought by the bill, has not even the extenuating circumstances of mistake or accident.

So far as the pleading is concerned, the bill makes no pretense that there was any misunderstanding or misinformation of any sort which caused or in any way contributed to the default. Harry King testifies that he and the lessee knew that the lessee must pay the taxes and that they fell due in May and November (Rec., p. 187).

There is no suggestion of ignorance, surprise, or misinformation, and in view of this testimony, that the lessee and her agent knew of the obligation to pay the tax and when it was payable, no such claim can be made.

The only averment in the bill which can be construed as attributing the default to *accident* is in the fifth paragraph, which alleges that (Rec., p. 3)—

> "wholly through *oversight* and *inadvertence*, and *in part* occasioned by the affliction and mental distress suffered by the complainant in consequence of the death of her said husband, added to the perplexity and distraction caused by the unfortunate condition in which his business affairs were found to be after his death, the instalment of the taxes due upon the said property for the second half of the fiscal year ending June 30, 1898, and payable in the month of May of that year, were overlooked and left unpaid."

Conceding, *arguendo*, that this averment amounts to an allegation of accident, what is the accident set up? It is that the non-payment of the tax was due to oversight and inadvertence, and this oversight and inadvertence, if it can be said to be accident within the legal meaning of that term, is alleged to have been, not wholly, but *in part only*, the result of the mental distress of the complainant, consequent upon the death of her husband and the perplexity and distraction resulting from the financial condition of his business. It is to be observed that this alleged cause of oversight is purely personal to the complainant, and not a matter that is alleged to have affected, or which could have affected, a business agent in charge of the matter.

The complainant's husband died on the 15th of August, 1897, and the tax was not in default until the 31st of May, 1898, nearly ten months later. The court below, in its opinion on the final hearing, entirely ignoring the fact that the complainant did not testify at all, and the further fact that the evidence offered in her behalf by her own witnesses conclusively established that she had no more to do with this business than an utter stranger, with reference to this default says (Rec., p. 491):

> "The lessee was *in the midst of financial trouble* and distress caused by the recent death of her husband, who had been the lessee down to the time of his death. The record shows to us quite plainly that the default of the lessee was excusable under the circumstances."

That the death of the complainant's husband was a source of mental distress to her must, of course, be assumed without any reference to testimony, but the record demonstrates that it had no effect upon the successful business activities of her business agent in respect of other matters, and it must not be forgotten that the default referred to occurred nearly a year after this

bereavement. The testimony of her business agent puts beyond peradventure that the *financial difficulties* surrounding her husband's estate had no reference to or influence upon this matter. It appears, from that testimony, that within a fortnight after his death she purchased the business conducted in these premises and that the same was conducted there by her business agent without any co-operation on her part, and that that business was in every respect successful, and that she had ample means to conduct it, and that the taxes and rent due under this lease were paid from it. This business agent, Harry King, testifies that the complainant "had life insurance, quite a lot of it;" that the business there conducted "did not involve the estate, and the estate did not involve the business." "The estate had no bearing upon the business;" "that she bought the stock and leases, but not the debts, and did not become liable for the debts" (Rec., p. 185). Again, that she was not at all embarrassed in the conduct of that business; that the busy season was just approaching, and that she succeeded. She paid promptly all the debts of the business and was "not strained at all, so far as this business was concerned," in meeting liabilities and living expenses. That the business was fairly successful, and she earned something the first year, and when asked to state how much was earned, he says: "I am unable to say, and I do not know that I ought to give the results of our business here" (Rec., pp. 186-7).

In view of the fact that it was incumbent upon the complainant to prove some state of facts which could properly be said to amount to legal accident, and in view of the fact that the only pretense, in the bill, of excuse for oversight is the financial disorder of *her husband's estate*, it is respectfully submitted that proof of the prosecution of a successful business, entirely disconnected from the estate of her husband, in the very

premises covered by the demise, for the purchase and prosecution of which business the complainant had ample capital, does not create a situation which can be properly characterized, as it is in the opinion of the court below, as "financial trouble and distress caused by the recent death of her husband."

The failure to redeem this tax sale, when the opportunity was afforded the complainant, can certainly not, upon this record, be attributed either to mental or financial distress resulting from the recent death of her husband, or the involved condition of his estate. This refusal to redeem occurred *more than four years after her husband's death*, and in the meantime her business had continued to prosper and her agent had refused to sell this leasehold for $15,000 (Rec., pp. 406-7), and was perfectly willing, as the record shows, to imperil the lease and the lessor's title in fee while chaffering with Wiltsie over a difference between them of only $25 (Rec., pp. 55, 175-6).

The court, in its opinion on the first appeal, excuses this negligence in the following terms (Rec., pp. 499–500):

> "And we can not hold that her delay in redeeming the tax certificate was wholly unreasonable, in view of the fact that she had been advised that the sale for taxes was invalid."

If this advice had proceeded from the lessor's counsel, its relevancy would be obvious, but it is not perceived how the advice of counsel, adverse to the lessor, can bar the lessor's remedy, however it may explain the conduct of the lessee.

That it was the lessee's duty to pay the taxes is admitted by the bill. The necessity for the performance of this duty was the protection of the lessor's title. Would it be contended that the lessee could escape the performance of this duty by showing that counsel, adverse to the lessor, had advised that it was not obligatory?

Assuredly not. Clients act upon the advice of their counsel at their own peril, and not at the peril of their adversaries.

But, as before shown, Harry King states in his testimony the precise reason why this tax was not paid in May, 1898, and it is not the reason alleged in the bill. After stating (Rec., p. 187) that he knew the lessee must pay the taxes, that they became due in May and November, and that the tax for November, 1897, was not paid when due, he testifies, in response to Mr. Perry, as follows (Rec., p. 187):

> "Q. When May came around, what did you do? A. *I did not do anything. I had not charged my mind with it at all.*"

And he follows this up with the same answer as to November, 1898; May, 1899; November, 1899, and May, 1900.

Thus, by his positive testimony as to *five successive instalments of taxes falling due after November, 1897, he did nothing at all, because he had not charged his mind with it.*

This, be it remembered, is the evidence for the complainant, and the witness testifying was the one having sole charge of the matter.

It is respectfully submitted that such testimony can not establish accident or mistake, nor support the allegations of the bill, but that it does establish wilful and persistent negligence.

Tenant Not Misled by Lessor, But Given Timely Warning to Observe Covenant and Pay Taxes.

In the opinion on the final hearing the court below appears to attach some blame to the lessor for the failure of the lessee to pay the taxes. In the course of the opinion the court says (Rec., 491):

> "The testimony shows quite conclusively that

> while the lease *required* the annual taxes on the property *to be paid by the lessee*, yet the *invariable* custom of the lessor *down to the time of the default* had been to demand and receive the amount of the taxes from the lessee, and to pay the taxes herself by her own agents. For the taxes of the second half of the year 1898, in connection with which the default occurred, the lessor failed for some reason to make the usual demand for the money wherewith to pay the taxes, and the lessee was in the midst of financial trouble and distress caused by the recent death of her husband, who had been the lessee down to the time of his death."

It is quite true that while Henry King, jr., was lessee, the practice of the lessor was to pay the taxes and to demand a refund from the lessee. But because she had adopted that course with him she was not bound to continue it with every other lessee, and the proof, by the complainant's own testimony, is that the *first* time taxes accrued due *after* the *complainant became lessee*, the lessor held her to the letter of the contract and required the lessee to pay the taxes directly. This is the express testimony of complainant's witness, Joseph King (Rec., p. 154).

This notice to the new tenant to pay the taxes directly, and not to look to the landlord to do so, was given in December, 1897, according to the witness, and the tax was thereupon paid (Rec., pp. 154, 168, 169), while that for which the property was sold did not fall due till the following May (Rec., p. 3, par. 5 of bill). That the lessee and her agents understood the obligation from thenceforth is established by the testimony of complainant's witnesses, who show that no notice was ever thereafter received, and all taxes which were paid were paid by complainant's agent without notice or request from the lessor (Rec., pp. 126, 171, 187, 188).

Furthermore, the pleadings do not make this matter of

the prior practice with the former tenant an issue in the cause, nor an excuse for the default. The bill does not allege that this prior practice with the prior tenant had anything to do with the non-payment of the tax, nor does it even aver that such prior practice existed, but the sole reason assigned for the default is *oversight*, alleged to be due to mental distress consequent upon her husband's death and the condition of his estate (Rec., p. 3). It is nowhere mentioned in any of the pleadings and was apparently unknown to, or forgotten by, the complainant at the time the bill was filed.

The testimony of complainant's witness, Harry King, states the *only* reason why the taxes were not paid, namely:

> "*I had not charged my mind with it at all*" (Rec., p. 187).

The court, therefore, erred in giving that matter any consideration whatever.

Case Presented by Bill Not Such as Equity Can Relieve.

In the absence of any wrong-doing on the part of any of the defendants or of any act by any of them tending to mislead the complainant, the question is simply, can a court of equity relieve from the forfeiture resulting from the non-payment of taxes, where an irredeemable tax sale has been made and the tenant is legally incapacitated from tendering, along with the bill, a complete performance of the covenant and a complete reparation of the breach?

It is worthy of note that in the two opinions delivered by the Court of Appeals in this cause, no reference is made to any judicial decision nor even to any text-book on this question. The court appears to treat it as a fundamental principle that, if the thing covenanted to be

done by the tenant is a part of the consideration for the lease, then, irrespective of the object of the covenant or the consequences from its breach, the covenant is to be treated like the covenant to pay rent, and is therefore relievable in equity. But even a forfeiture for breach of a covenant to pay rent can not be relieved in equity unless the tenant actually pays or tenders the rent. So, why should there be relief from the forfeiture for the breach of a covenant to pay taxes, unless the taxes have been paid and all injuries incident to the breach first removed?

It is submitted, however, that the two covenants are in no respect analogous.

In the case of Gordon *vs.* Richardson, 185 Mass., 492, decided in May, 1904, a little over a year after the decision by the Court of Appeals on the first appeal in this cause, the Supreme Judicial Court of Massachusetts, in a well-considered decision by Mr. Justice Loring, pointedly states the important distinction between a covenant to pay rent and one to pay taxes, and holds that upon reason and authority, the forfeiture for breach of covenant to pay taxes, after a tax sale, *though the tax sale be still redeemable*, is not relievable in equity. The court says (p. 492):

> "The ground on which a tenant gets relief in equity from the forfeiture of his estate for a failure to pay rent is that in equity the landlord's right of re-entry is given as security for the payment of the rent, and on the rent being paid *the very thing is done for which the security was given;* and, although the payment in that case is made after it is due, on interest being paid compensation is made for the delay in performance, and on compensation being made the plaintiff is entitled to relief."

And, further, the court says (p. 493):

> "But that does not cover the case before us.

In this case the defendant entered *for breach of the covenant to pay taxes*, as well as for breach of the covenant to pay rent. When he exercised his right of re-entry in September, 1902, not only was the tax for 1900 not paid, but *the estate of the defendant had been sold because of the plaintiff's failure to pay this tax* as he had covenanted to do. The defendant's estate had been sold to pay this tax in the June preceding the September when the defendant entered on the estate. The thing here in question secured by the right of re-entry, not only has not been performed but it can not be performed now. The tax for 1900 has been paid, and no longer can be paid by the plaintiff. The tax was paid to the collector by the application thereto of the proceeds of the tax sale. *There is a right to redeem this tax title*, but the tax has been paid, and *the thing secured by the landlord's right of re-entry can no longer be performed by the tenant. By the very terms of the covenant secured by the forfeiture, any performance of it is at an end, and that is the end of the plaintiff's application for relief* from the forfeiture in the case at bar.

"Moreover, if it were permissible to look behind the terms of the covenant here in question to what might be termed its true nature and substance, the plaintiff would gain nothing. If you look beyond its terms, *the real substance and nature of a covenant to pay taxes assessed on the demised premises is to protect and hold harmless the landlord's estate. When the breach of the covenant has reached the stage where the landlord's estate has been sold to pay the taxes which the tenant should have paid, and through the default of the tenant a paramount outstanding title has come into existence, we have a breach of covenant for which the plaintiff fails to show that compensation can be made.* It is like the breach of a covenant to insure or repair, where equity does not ordinarily grant relief against forfeiture of the tenant's estate."

If this be a correct statement of the law, then manifestly the complainant's case is wholly without equity, and the bill should have been dismissed.

II.

No Relief Could Properly be Granted Against the Appellants Because of Multifariousness.

This bill seeks, on the one hand, to litigate between the complainant and the lessor the right of re-entry, and between the complainant and these appellants the validity of a tax title not in anywise derived from the lessor, but originating in the paramount right of the sovereign and asserted by the appellants in hostility to the lessor.

There is no pretense of any privity of interest under the lease among the several defendants, or between the defendants Cohen and the Kanns on the one hand and the complainant on the other, while the right of the defendant Kennedy to forfeit the lease, and of the complainant to be relieved from the forfeiture, were questions wholly between complainant and defendant Kennedy.

Obviously the complainant had no legal or equitable right to force a contestation of the tax title to the end that, if successful, complainant should be relieved of the forfeiture, and if unsuccessful the lessor should bear the consequences. The tax title was one created by act of the law. Default having been made in the payment of the tax by the lessee, the tax sale and subsequent execution of a tax deed by the public authorities were lawful acts in pursuance of an obligatory public duty, and by express provision of statute passed to the grantee a *prima facie* title in fee simple. The lessor had the undoubted right to contest the validity of that title, but she was not *compelled* to do so, especially at her own risk, and for the benefit of her defaulting lessee. If she could extinguish the tax title by compromise, without the risk and expense of litigation, upon terms satisfactory to herself, it

is submitted that in the absence of any wrongful act or agreement upon her part, she had the perfect right to do so, notwithstanding such compromise might necessarily involve the termination of the defaulting tenant's lease by the lessor.

By the express terms of the contract of letting, the lessor was given the absolute right to terminate the lease for default, by the lessee, in payment of taxes, and Mrs. Kennedy had done no act by which that right was in anywise impaired.

The bill, therefore, seeks to enforce an unnecessary litigious controversy between the defendant Kennedy and the defendants Kanns and Cohen, with respect to a matter wholly between them and as to which they are able to effect a satisfactory settlement without litigation, solely for the benefit of complainant, as an incident to relief from the forfeiture and at the risk of the lessor. To allow the defaulting tenant thus to experiment with the lessor's title, at the lessor's risk and wholly for the benefit of the tenant, it is submitted is not a part of the equitable right to relief from forfeiture.

The theory of the bill is, that the defendant Kennedy was, in reality, in control of the tax title, though it was vested in another, and that she was having it used merely as an apparent obstacle to relief from the forfeiture. The testimony, however, does not support that contention, but wholly disproves it, as heretofore shown.

There never was any such arrangement between Mrs. Kennedy and any of the parties; she was not, in any way, directly or indirectly, a party to or responsible for the acquisition of the tax title, and from its inception to the present time it has been held in hostility to her. The legal and equitable relation of the parties is, therefore, no different than if Wiltsie had remained the owner of the tax certificate and had obtained a deed for the property instead of passing it to an assignee. Had the

allegations of the bill been sustained by proof and the tax title shown to be in reality in the control of Mrs. Kennedy, as claimed, a contest as to its validity would then, under the theory of this bill, have been unnecessary and improper, because its use and disposition would be wholly within her power, irrespective of its validity or invalidity.

Indeed, such is the contention of complainant in the bill. After alleging certain claimed irregularities as to the tax title, the sixteenth paragraph avers that—

> "Even *independently of the said irregularities and defects* in the said tax proceedings, *the manner of the acquisition of the said tax deed and the circumstances attending the same are, of themselves, of such a character as to render it contrary to equity and good conscience that the said tax title should be allowed to be set up* for the purpose of hindering, embarrassing, and defeating the complainant's right in a court of equity to seek relief against the attempt to enforce the said forfeiture" (Rec., p. 11).

So that, according to complainant's bill, even if the tax title should be decreed to be valid, nevertheless, complainant would still be entitled to the relief prayed against enforcement of the forfeiture, because of the "*manner of the acquisition of the said tax deed, and the circumstances attending the same.*"

The invalidity of the tax title is, therefore, not made an element, under this bill, of complainant's right to relief. Valid or invalid, the contention is that appellants *are barred from setting up the tax title* because of some supposed peculiar equity in the complainant growing out of "the manner of the acquisition of the said tax deed and the circumstances attending the same." The real and only object of the bill in alleging the invalidity of the tax deed is, obviously, to endeavor to mitigate the consequences of the tenants' default and not to found

any relief upon the adjudication of such invalidity. The relief is distinctly claimed independently of such invalidity.

It is respectfully submitted that the lessee can not claim, as an incident to the ordinary right in equity to restrain a re-entry, the right to litigate with these appellants, at the landlord's risk, the question of the validity of the tax title which has accrued through the tenant's breach of condition.

This is not a case of a tax title void upon its face. The deed is "*prima facie* evidence of a good and perfect title in fee simple," and its invalidity can not be established by averment merely, but can only be established by the *judgment of a court* having jurisdiction of the question. The very fact that the court below, in its opinion on the first appeal, submitted that matter to inquiry and even suggested that issues might "*be sent to a court of common law to determine its validity*" (Rec., p. 502) demonstrates that on the case then made for relief there was a question to be tried, which might eventuate *either way*, and the court, in the same opinion, says (p. 501):

> "Either this tax deed is *valid, or it is invalid.* If it is valid, *then appellant's* [lessor's] *title to the property is gone,* and he has *no right to re-enter and dispossess the lessee.*"

The position, therefore, is, that the defaulting tenant may restrain the re-entry by the landlord, until the question of the validity of the tax deed is litigated to conclusion by the tenant, either in the same suit or by ancillary proceedings at common law. If found *invalid* the forfeiture will be relieved against, because no injury has been done. If found to be *valid*, still the landlord can not re-enter, because his title is gone, and the tenant can then defeat the right of re-entry, on the ground that,

through the tenant's own wrong, the landlord has lost his title to the property.

If a result so abhorrent to justice can be achieved by joining these two independent controversies in the one suit, it would seem that no stronger argument against the multifariousness of the bill can be suggested.

III.

The Tax Sale Is Regular and Valid.

It is respectfully submitted that this court should not undertake to determine the question of the validity of the tax title for the reasons already indicated.

If the adjudication of its invalidity is essential to complainant's right to relief, then, obviously, that inquiry should never have been entered upon, but the bill should, for that reason alone, have been dismissed.

Admitting the right of the court in this proceeding to try the validity of the tax title at the suit of the tenant would result in this obvious anomaly, namely:

If the court found the tax title to be valid, which it must be conceded it could do if it can adjudicate upon it at all, instead of placing the parties in *statu quo*, the essential purpose of the relief from forfeiture, the court would be compelled to complete the mischief originating in the tenant's default and destroy the title of both lessor and lessee.

Nevertheless, the court below undertook to enter upon this inquiry, and to adjudge the tax title to be invalid, which these appellants are therefore compelled to assign as error, and the consideration of that branch of the case will now be presented.

In the fifteenth paragraph of the bill the complainant alleges, as to the tax title, that—

> "*the proceedings for the sale* of the property covered by her lease for default in the payment of

> the second instalment of taxes for the year ending June 30, 1898, are *wholly and radically irregular, defective, illegal, and void*" (Rec., p. 10),

and in eight subparagraphs, alphabetically designated from *a* to *h*, both inclusive, sets forth the alleged grounds of irregularity said to render the sale illegal and void (Rec., pp. 10-11).

The answers of the defendants, Cohen and the Kanns, deny the jurisdiction of the court, in this proceeding, to inquire into and determine as to the validity of the tax title, and also deny the allegations of fact as to irregularity in said sale (Rec., pp. 51, 71-72).

The answer of the defendant Webb denies the right of complainant to force a contest of the tax title, and insists upon his right to extinguish it by amicable compromise without the risk and expense of litigation (Rec., p. 83).

Upon examination of the alleged irregularities set out in the bill it will be found that they consist of two classes, viz: Subparagraphs *a* and *h* (Rec., pp. 10, 11) set forth alleged irregularities *in the sale itself*, and subparagraphs *b* to *g* (Rec., pp. 10, 11), both inclusive, set forth alleged irregularities in the subsequent official report of the sale.

Alleged Irregularities in the Sale Itself.

(*a*) *The alleged error in assessing in the name of Maria T. Gillis.*

The first irregularity alleged is that—

> "The statute requires that the property should be assessed '*in the name of the owner or trustee or trustees of the owner thereof,*' and that the advertisement of sale should be in the name of the person against whom assessed. The property in controversy was assessed and advertised in the name of Maria T. Gillis, whereas the defendant,

> Marianne A. B. Kennedy, is, and for the last twenty-five years has been, the owner thereof in fee simple and in severalty" (Rec., p. 10).

The terms of the statute providing for the assessment are as follows:

> "All real property in the District of Columbia, *except as hereinafter provided,* shall be assessed in the name of the owner, or trustee or trustees of the owner thereof. *All undivided real property of a deceased person may be assessed in the name of such deceased person,* until the same is divided according to law, or has otherwise passed into the possession of some other person or persons, and all real property, the ownership of which is unknown, shall be assessed 'owner unknown'" (28 Stat., 282).

The statute regulating the sale provides that the printed notice or advertisement of the tax sale—

> "*shall contain the name of each and every person in which each piece of property is assessed*" (30 Stat., 250).

From the foregoing provisions of law it is seen that the property *must* be advertised *in the same name in which it is assessed,* and that the tax collector has no right to advertise the property in a *different* name from the one in which it is *assessed.* The question, therefore, is not as to the rightfulness of the name used in the *advertisement,* but is as to the name used in the *assessment.*

It may be said, in passing, that the validity of the original assessment can not well be questioned in this proceeding; if there never was a valid assessment, there was no obligation to pay the tax, and that would have constituted a complete defense at law to the landlord and tenant proceedings. The bill, of necessity, admits

the validity of the *assessment*, the obligation of the tenant to pay it, and the validity in law of the forfeiture from which it seeks relief, as a purely equitable remedy.

Gordon *vs.* Richardson, 185 Mass., 492.

Under these conditions it would seem that whatever may have been the rights of Mrs. Kennedy, the complainant is estopped from questioning the regularity of the *original assessment*, and as the law specifically required the property to be *advertised* in the name *as assessed*, the objection of complainant that it was assessed, advertised, and sold in the name of Maria T. Gillis is untenable.

Apart from this answer to the objection of invalidity in the assessment, it is still insisted that the assessment in the name of Maria T. Gillis was regular and valid, and in accord with the terms of the statute.

The statute does, in terms, require that the property "shall be assessed in the name of the owner," but that is not an absolute provision. It is qualified by another and very important exception, which the complainant ignores in the bill. That qualification is that—

> "All undivided real property of a *deceased* person *may be assessed in the name of such deceased person* until the same is divided or has otherwise passed into the possession of some other person or persons " (28 Stat., 282).

It is this provision of the law which is now presented for construction and interpretation, and the real question is, under what conditions property of a deceased person may lawfully continue to be assessed in the name of the deceased owner?

This statute, like all others, must receive a sensible construction in the light of its purposes and objects one which, if possible, will effectuate those purposes and objects, and not one which, through blind adherence to

mere words, in disregard of the legislative intent, will tend to defeat them or to lead to absurd consequences or involve impossible conditions. Such is the rule of construction of statutes adopted and applied by this court.

In the case of United States *vs.* Kirby, 7 Wall., 482, Mr. Justice Field says (pp. 486-7):

> "All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter."

In Smythe *vs.* Fiske, 23 Wall., 374, the court in construing a tax law (the tariff act of July 30, 1864), through Mr. Justice Swayne says (p. 380):

> "A thing may be within the letter of a statute and not within its meaning; and within its meaning, though not within its letter. The *intention* of the lawmaker is the law. Revenue laws are to be construed liberally to carry out the purposes of their enactment. Their penal provisions are not penal in the sense that requires a rigidly strict construction."

To the same effect are the decisions in the following cases:

Carlisle *vs.* U. S., 16 Wall., 147, 153.
Atkins *vs.* Disintegration Co., 93 U. S., 634, 638.
Church of the Holy Trinity *vs.* U. S., 143 U. S., 457, 459-60.
Hawaii *vs.* Mankichi, 190 U. S., 197, 212-14.

The object and purpose of this law are to levy and collect taxes for the maintenance and support of the

municipal government of the District of Columbia, without which it could not exist, and the duties imposed upon its agents in the assessment and collection of the taxes must be construed so as to be possible of performance.

The law does not require, as a condition precedent to the right to assess a tax, that the assessors shall have an examination made as to the title to every piece of property taxed and an inquiry into all matters *in pais* affecting such titles down to the day and hour of the assessment. The expense would far exceed the tax in most cases, and the time consumed would be an insuperable barrier to the performance of such a duty.

It is submitted that the taxing authorities were not bound to look *beyond the record title*, and if that showed the title in a certain person the requirement of the law is gratified by assessing in the name of such person. That such was the source to be looked to by the assessors and acted upon is plain from the provisions of the Revised Statutes of the District on that subject then in force and which must be read in *pari materia* with the law in question.

Section 144 of the Revised Statutes of the United States relating to the District of Columbia, which is taken from the act of May 15, 1820 (3 Stat., 590-591), and had, therefore, been in force for seventy-four years, provides that—

> "*The recorder of deeds and the register of wills* shall furnish the proper officer of the District appointed to receive the same, on or about the first Monday in January and July in every year, *correct lists of the transfers of real property* in the city of Washington, during the next preceding half-year, *so far as can be ascertained by the records in their respective offices;* and the District shall make to the recorder and register such compensation as shall be agreed upon, not exceeding six cents for each transfer on such lists."

The requirement in the act of 1894, that the property should be assessed in the name of the owner, must be read in connection with the other statute regulating the sources of information from which knowledge of the owner was to be obtained, namely, from the recorder of deeds and the register of wills, in whose offices transfers of title by deed or devise or descent would ordinarily appear. If the name used in the assessment conformed with the facts ascertained from these sources, can it be said that it is invalid? Can it be that Congress required the recorder of deeds and register of wills to furnish the taxing authorities with the information as to the record title to real estate and required the District to pay therefor, and yet the taxing authorities were not authorized to act upon the information so furnished? Could the owner of property under an unrecorded deed claim that an assessment was invalid because made and continued in the name of his grantor, the owner of the property as shown by the record?

It is respectfully submitted that such a construction of the statute would be unreasonable and insensible, and would lead to absurd consequences, and, in practical effect, repeal the statute by rendering its execution impossible.

What are the facts as to the title to this property, as disclosed by the record?

The property in controversy was conveyed, by a duly recorded deed, from Phineas Bradley, father of Maria T. Gillis, to William A. Bradley, in trust for Mrs. Gillis, in November, 1830 (Rec., pp. 464–5), and in October, 1860, by a duly recorded deed, it was conveyed by William A. Bradley, trustee, to Maria T. Gillis (Rec., pp. 466–7). It must be presumed that the law was complied with and that the recorder of deeds duly informed the assessing authorities of these transfers.

By the evidence in this cause it is established that up

to the institution of this suit there was no record of any deed nor of any judgment or decree of the courts of this District divesting the title of Maria T. Gillis (Rec., p. 468); also that there is no record of any will of Maria T. Gillis in the office of the register of wills, nor any unrecorded will of hers on file there (Rec., p. 469), nor any record of administration upon her estate or of anything relating to her (Rec., p. 469). There was, therefore, no matter of record showing, or other lawful and accessible means of discovering, a devolution of the title of Maria T. Gillis or even the fact that she was dead.

Nor is this all. The evidence in this case establishes the further important fact that though Maria T. Gillis died intestate in January, 1871, leaving the defendant, Marianne A. B. Kennedy, as her only heir at law (Rec., p. 126), yet from 1869 to 1902, *a period of thirty-three years in all, and thirty-one years after the death of Maria T. Gillis*, the property was continuously assessed in the name of Maria T. Gillis (Rec., p. 468), and during all that time, without protest or objection, the taxes were paid in her name (Rec., p. 468).

If this were merely a proceeding in behalf of Mrs. Kennedy to have the assessment for 1898 canceled because made in the name of Maria T. Gillis, would any court afford her that relief in the face of these facts? Can there be any doubt in the mind of the court that the permission in the act of 1894 that "real property of a *deceased* person *may be assessed in the name of such deceased* person" applies to such a case as this?

The act of 1894 has not been judicially construed, but somewhat similar questions have arisen in other jurisdictions, and the validity of the assessments been sustained. The case of Dickison *vs.* Reynolds, 48 Mich., 158, was an action of ejectment in which the plaintiff claimed the property as one of the heirs of Frederick Dickison, to whom the property had passed by partition.

The defendant claimed under a paramount title by tax sale. Judgment was given in favor of the plaintiff, the court holding that the tax sale for the year 1871 was void.

This judgment was reversed by the Supreme Court and the tax sale held valid. The law in force at the time of the tax sale, applicable to the case, provided, among other things, as follows:

> "Sec. 987. The assessment roll shall contain the *names* of the resident persons *liable to be taxed;* full description of the real estate *of such persons,*" etc.
>
> "Sec. 976. The undivided real estate of any deceased person may be assessed to the heirs or devisees of such person, unless occupied by some other person to whom it may be assessed, without designating them by name, until they shall have given notice to the supervisor of division of such estate, and the names of the several heirs and devisees."

In passing upon this statute and the validity of the tax sale, the court, by Mr. Justice Cooley, says (p. 161):

> "The tax sale for the year 1871 is supposed to be invalid because the assessment was made to 'Dickison estate' instead of the heirs at law by name. We think not. The estate was at that time undivided, and the statute—Comp. L., sec. 976—permitted lands to be assessed to the heirs or devisees without naming them. Assessing it to the *estate* was in legal effect assessing it to the unnamed heirs."
>
> . . . . . .
>
> "Our conclusion is that the tax sales for 1871 and 1873 were not shown to be invalid, and that the circuit judge erred in holding them to be so" (page 163).

A case, similar in principle and judgment, was decided by the Court of Appeals of Maryland.

In the case of Moale and others against the Mayor and City Council of Baltimore (61 Maryland, 224), Irving, Justice, in the opinion, says (p. 234):

> "The bill in this case was for an injunction to restrain the city authorities from selling the property of the complainants, the heirs at law of Randall H. Moale, for the payment of certain paving taxes assessed to the estate of Randall H. Moale, and claimed by the city to be a lien on the property."

The ordinance under which the assessment was made is as follows (p. 235):

> "That the City Commissioner be, and he is hereby, authorized and directed to have Hanover street, from Clement street to the shore of the middle branch of the Patapsco River, graded, paved, and kerbed, and to assess upon the *owners* of property on said street, between the streets named, their proportional part of the expenses of said paving, grading, and kerbing, in accordance with existing ordinances and acts of assembly."

Another section of the ordinance provided:

> "That the collector of the city be, and he is hereby, directed to collect said expenses, when so assessed, from said property *owners* as other city taxes are collected."

The court, in its opinion, with reference to the mode of the assessment, says (p. 238):

> "Several exceptions are taken to the method of assessment by the city commissioner, which are relied on to defeat the claim in whole or in part. *First*, it is contended that the ordinance requires the cost to be assessed on the property *owner*, whereas the assessment is made to 'the estate of Randall H. Moale.' This contention is made on the assumption that we might overrule appellants' first objections, as we have done. The

assessment was made in 1875. Randall H. Moale died in 1864. The bill does not allege there had been a partition of the property, and from that fact, and the suit being joint, possibly we might be justified in supposing the property still enjoyed in common. But, *however that may be*, it would seem to be too narrow a point, and entirely too refined, and inequitably technical for a court of equity to declare that the city shall lose the tax and the appellants enjoy the benefits of the improvement without paying anything therefor, by reason of such imperfect designation of the person or property taxed. In common parlance, 'the estate' is not only understood to indicate the property, but the takers of it; and when it is said that an estate is charged with the payment of any claim, it is well understood that those who are to take, with the incumbrance, are to pay it, in due proportion among them. Manifestly this language was adopted not only to designate the property, but also that the former owner was dead, and that there were successors in title whom it was more convenient to designate in mass without separately naming them. After charging 'the estate of Randall H. Moale' as debtor, the assessment proceeds to describe the property particularly, and by metes and bounds. Thus it appears that the requirements of the act of assembly, strictly considered, have not been violated by the ordinance, and that whether the person or the property is to be assessed, in this case it is sufficiently done on both."

It is submitted that by the true requirement of the law as to assessing in the name of the owner the assessor is not bound to go beyond what appears of record as to the title.

Purchasers, mortgagees, creditors, and all other innocent purchasers for value, of real property, are not only permitted to rely upon the record, as to the ownership of such real property, but are bound thereby. Should any

different rule apply to assessments? According to the contention of complainant, if A convey lands to B and B fail to record his deed thereto, an innocent second purchaser for value from A will acquire a perfectly valid title against the real owner; yet an assessment for taxes, in the name of A, repeatedly paid by B, may be avoided by B on the ground that the property was not assessed in the name of the true owner.

It is submitted that this carries the rule governing assessments to an extreme and unreasonable extent, and that it was not the intention of Congress to impose upon the assessors any greater degree of knowledge of the title than a purchaser would acquire from an examination of the record, and that the assessment must be valid if the property be assessed in the name of the one who, of record, appears to be the owner. Especially must this be the case where, as here, the owner repeatedly pays the taxes assessed in the name of the owner of record *for more than thirty years* without disclosing his title or objecting to the mode of assessment.

To hold otherwise is to say that Congress intended to impose upon the municipal government, as a condition precedent to the right to lay a tax, a higher degree of certainty as to the title than is required of it where it purchases the property for full value for a school site or a public highway.

It is submitted that Congress did not intend to clog the levying or collection of taxes with any such impossible conditions to their exercise, and it is believed that no judicial decision can be found in which an assessment in the name of the person in whom the title stands of record has been held to be invalid for that reason.

When, by other provisions of law, as in section 144 of the revision above quoted, the particular source of ascertainment of ownership for the purpose of assessing is pointed out, and that source is the public record of

the transfer of titles, it seems clear that Congress did not intend that the assessor should ignore the record and seek through other means to ascertain a possible owner different from what the record disclosed, especially when the tax was regularly paid, without objection, when assessed in the name of the record owner.

The court below, however, held this assessment, in the name of the deceased owner, to be invalid, upon the authority of the decision of this court in the case of City of Washington *vs.* Pratt, 8 Wheat., 681.

The court, in its opinion, says (Rec., pp. 488–9):

> "Now, it is very clear that this assessment did not comply with the requirement of the act of Congress. A deceased person can not be the owner of property in the sense of the law. Especially can not a deceased person continue for twenty-five years after his death to be the owner of property. Assessment and the other requirements of the tax laws are intended to warn the living owner that his property is being dealt with by the public authorities under their supreme power to divest title in the event of failure to pay the public dues; and that living owner is entitled to the benefit of that warning to its fullest extent and to the most faithful compliance with the provisions of the statute. City of Washington *vs.* Pratt, supra. It will not do, therefore, to take a former owner, and continue his name until it suits the public authorities to change the assessments."

It is respectfully submitted that the decision in that case has no application to the case at bar, as the provision of the statute there under consideration was entirely different from the statute under which this sale was made.

In this case the statute in express words authorizes the assessment of the property in the name of the deceased owner, but under the eighth section of the act of

Congress approved May 4, 1812 (2d Stat., 727), the act involved in the Pratt case, the law not only required the property to be advertised in the name of the owner, but it was necessary to know *who* was the owner and *where* he resided, in order to know *how* to advertise.

By section 8 of the act (2d Stat., 727) it was enacted—

> "that unimproved lots in the city of Washington, on which two years' taxes remain due and unpaid, or so much thereof as may be necessary to pay such taxes, may be sold at public sale for such taxes due thereon."

It is to be observed that this is a very restricted power. It applied to but one class of property—unimproved lots; that is, vacant ground in the new city. It was also confined to the cases in which taxes for two years were in arrear and unpaid. The section also prescribed the manner of the sale of such property, namely:

> "That public notice be given of the time and place of sale by advertising in some newspaper printed in the city of Washington,"

and of this advertising there were to be *three* sorts, as the property might be subject to three different and distinct conditions, namely: "Where the property belongs to persons residing out of the United States," the advertising should be for a period of "at least six months." In those cases—

> "where the property belongs to persons residing in the United States, but without the limits of the District of Columbia,"

the advertising was to be for the period of "three months." In those cases "where the property belongs to persons residing within the District of Columbia or city of Washington," it was provided that the advertisement should be for the space of "six weeks."

It was this piece of legislation, enacted at the time it was, under the peculiar conditions then existing, which was involved in the case of the Corporation of Washington against Pratt and others in 1823 (8 Wh., 681). Not only were the conditions entirely different from those now existing, but the terms of the statute were entirely dissimilar to anything previously or since enacted by Congress with respect to tax sales.

The decision in the case, therefore, is not authority upon any question arising in the case at bar. It is *sui generis*, and the opinion deals not with any general principle or rule affecting tax assessments and tax sales generally, but is confined exclusively to the peculiar terms of the statute then under consideration. Indeed, the court in its opinion says (p. 683):

> "This question, as well as every other in the cause, must find a solution *in the provisions of the law which vests the power to sell.* Where these are explicit and consistent, there is no ground for adjudication but *their literal meaning.*"

In determining the power of the authorities under the statute, the court resorts to the important definitive phrase in the statute "*to whom the property belongs*" as controlling, the court saying (p. 685):

> "But, it is obvious that Congress were very jealous of the exercise of this power over the lots of *absentees;* and, in the previous provisions of this eighth section, they make the right of selling, with reference to the *time of the advertising,* to depend expressly upon *ownership;* not reputed ownership or assessment: 'to *whom the property* BELONGS' are the words of the law."

Nothing could be clearer than the requirement indicated in this statute. No authority existed to sell unimproved lots for taxation until this statute was enacted,

and before property could be offered for sale notice by advertisement was an indispensable requisite.

Before the notice prescribed by that statute could be given, it was incumbent upon the authorities to ascertain not only the actual ownership of the property, but the place of residence of such owner, for the reason that, by the terms of the statute, if the property belonged to a resident of the District, an advertisement of six weeks would suffice; if a resident of the United States without the District of Columbia, the advertisement must be for the period of three months; while, if the property belonged to a resident in a foreign country, the advertisement must be for at least six months.

Had there been an express enactment that in the assessment of the property no regard need be paid to ownership, and that assessing in the wrong name should be in all respects valid, the decision in that case must still have been as rendered, for the conclusive reason that in advertising the property for *sale, the character of the advertisement* was governed by the conditions of *actual ownership and residence of such owner.*

(*h*) *The alleged invalidity in payment of the purchase money.*

The allegation of the bill is that the statute provides that every purchaser at tax sale shall pay the amount of his bid within five days after the last day of sale; that the last day of sale was April 19, 1899, and that Wiltsie did not pay for this property until May 8, 1899 (Rec., p. 11).

This contention of complainant is erroneous in both law and fact. The law does not render the sale void if payment be not made within the five days, while the evidence shows that the payment was made within that time.

The statute provides that the purchaser "shall pay the amount of his bid to the collector of taxes within

five days after the last day of sale," but the consequence of not doing so is declared by the statute thus:

> "If any such purchaser shall not have paid his bid or the same shall not have been collected from him within the time above mentioned, *the Commissioners may set aside the sale* for which the bid was made, and all the rights of the purchaser under such bid shall *thereby* be extinguished," etc. (30 Stat., 250).

Thus, failure to pay within five days does not, *ipso facto*, avoid the sale, but it requires the affirmative action of the Commissioners to avoid it. And they are not *required*, but merely *authorized* to do so. "The Commissioners *may* set aside the sale," is the language of law, and it is "thereby," that is by such affirmative action of the Commissioners, that the rights of the purchaser are extinguished. If, in their discretion, they see fit to accept payment after the expiration of five days they may do so, and the sale is not affected thereby.

Not only is it entirely discretionary with the Commissioners under the statute to set aside the sale or to accept payment after the expiration of the five days from the last day of sale, but even if the Commissioners exercise that discretion and set aside the sale the consequences to the owner are the same. By the express terms of the law, if the Commissioners set aside the sale—

> "the said collector of taxes shall thereupon be held to have bid the amount due on the said lot and to have purchased it for the District" (30 Stat., 250–1).

If it is not then redeemed within the two years allowed for redemption, then by the terms of the statute the Commissioners are to sell the property at public or private sale—

> "and issue to any purchaser of such property a deed, *which deed shall have the same force and effect* as the deed hereinbefore provided for in

this section for property sold at the regular annual sale" (ib., 251).

In this connection it must be remembered that the purpose of the sale is not to load down the municipal government with liens upon or titles to real estate, but the sole object of the statute and the proceedings of sale which it prescribes is to realize, in cash, the revenue sought to be raised by the tax. The importance of allowing the Commissioners this discretion as to the time of payment, and thus enabling them to secure cash instead of liens on real estate, is shown by the evidence in this case, taken by the complainant. From that testimony it appears that there were some *twelve thousand pieces of delinquent property* involved in this sale (Rec., p. 162). About *eight thousand* pieces were sold (Rec., p. 162), of which about *five thousand* pieces were sold to others than the District, realizing *over one hundred and fifty-five thousand dollars in cash* (Rec., pp. 161–2).

It also appears that Wiltsie paid to the District on May 8, 1898, more than five days after the last day of sale, *more than one hundred and two thousand dollars*, and had the Commissioners not exercised the discretion allowed them by law and accepted this sum, the revenues of the District would have been reduced by that large amount. It is respectfully submitted that the law was not designed to produced such a result; that prompt payment by the purchaser within five days was prescribed under pain of losing the purchase wholly for the benefit of the District, unless, in their discretion, the Commissioners saw fit to accept payment after that time.

Payment Was Made in Time.

The evidence shows, however, that payment was made in due time. The statute provides for the giving of a certificate to the purchaser at the tax sale in these terms:

"Immediately after the close of the sale, *upon*

> *payment of the purchase money*, the said collector of taxes shall issue to the purchaser a certificate of sale" (30 Stat., 251).

The certificate issued to Wiltsie is dated April 13, 1899 (Rec., p. 17), the day of his purchase (Rec., p. 159), but was executed April *twenty-fifth*, 1899 (Rec., p. 18), and it recites on its face that "*The receipt of the above taxes, penalties, and costs of sale is hereby acknowledged*" (Rec., p. 18).

As the law did not allow the collector to execute a certificate except "upon payment of the purchase money," and as the certificate recites that it has been paid, in the absence of controlling evidence to the contrary, the officer will be presumed to have done his duty, and the recital in the certificate will be presumed to be true.

The only evidence here is that Wiltsie made a deposit on April *twelfth*, of *ten thousand dollars* (Rec., p. 158), and paid the balance of his purchase money on May 8 (Rec., pp. 158, 162). While it appears that between the 12th and the 19th Wiltsie made purchases far in excess of $10,000 (Rec., p. 159), it does not appear that certificates were issued to him in excess of that sum. In point of fact, the only certificate shown to have been issued to him up to April 25 is the one in controversy, the total amount of which is $148.83, against which the collector had a fund of $10,000 paid by Wiltsie the day before the sale.

As the evidence fails to show that any other certificate was issued to Wiltsie up to April 25, the court can not *assume*, without evidence, that any others were issued; and especially can it not assume, without evidence, that other certificates had been theretofore issued, to an amount in excess of the $10,000 then in the collector's hands, and that, in issuing this, the collector violated

the law and his official duty and inserted in the certificate a false recital of payment.

The evidence, therefore, conclusively shows that the payment was made on April 12, within the time specified by law, and that the objection based upon the time of payment is unfounded in fact.

The Alleged Errors in the Report of Tax Sales.

The alleged errors in the report are specified in subparagraphs lettered *b* to *g*, both inclusive, of paragraph 15 of the bill (Rec., pp. 10-11).

It is to be observed that all these criticisms of the collector's report are based upon alleged defects not claimed to exist in the *original* report, but in a *copy* contained in books in the office of the recorder of deeds. Subparagraph *b* alleges that—

> "The *only* report of any tax sale made in the year 1899 *is recorded* in liber 2391, at folio 411, of the land records of the District of Columbia. . . . If these fragmentary entries can in any manner be connected together so as to make a valid, legal report as required by the statute, which is not conceded, still the *said* report is irregular for the following particulars" (Rec., p. 10).

In that, and the ensuing subparagraphs, the alleged defects said to exist in the *record* of the report are set forth in detail. The answer of the defendants Kanns avers, *inter alia*, that—

> "They are advised and therefore aver that *the law does not require the said report to be recorded* by the recorder of deeds, but *merely to be filed in his office, and no record*, perfect or imperfect, *can affect the validity and accuracy of the original report*, accurately and duly made as required by law and filed with the recorder of deeds" (Rec., pp. 71-2).

Thus the pleadings raised the issue of law as to whether the *record* of the report or the *original* was the proper subject of inquiry, and denied that the *original* was defective. Of course, the complainant had the right to stand upon this issue, but if the regularity of the *original* report was to be attacked the bill should have been amended and the defects, if any, in the *original* report alleged. The bill contains no averments whatsoever as to any defect or irregularity in the *report itself*, but is confined solely to allegations of defects and irregularities said to exist in the *copy* or *record* of that report.

The first inquiry, therefore, is as to whether the alleged *recora* of the report is competent evidence of the *report itself*, all evidence of that kind being denied competency by the answer (Rec., pp. 71–2), and having been formally objected to when offered in evidence in the cause (Rec., pp. 230–231, 233).

The Recording of the Collector's Report Not Authorized by Law.

The only provision of law requiring or authorizing the collector's report of tax sales to be recorded is section 175 of the Revised Statutes of the United States, relating to the District of Columbia, approved June 22, 1874, which provision is as follows:

> "The collector of taxes, or other officer of the District, charged with the duty of selling any real estate in the city of Washington for taxes shall, within ten days after every such sale, *transmit* to the recorder of deeds an accurate report in writing, duly certified, containing a particular description of the property sold, the amount of taxes for the raising of which it has been sold, the names and residence of the person or persons to whom such property belongs, or to whom such taxes have been assessed, and of the purchaser or purchasers, and the amount of the purchase money,

> distinguishing how much has been actually paid and the clear surplus, if any, coming to the proprietor, which report *it shall be the duty of the recorder forthwith to record* among the land records of the District, *and the expense thereof shall be paid by the party who redeems the same.*"

This provision of law is taken from section 2 of the act of Congress of February 20, 1819 (3 Stat., 486).

The sixth section of the act of March 3, 1877 (19 Stat., 398), provided only that the collector should file a report with the comptroller, and contained no reference to or provision for the filing of a report with the recorder of deeds.

The act of February 6, 1879 (20 Stat., 283), provided that the collector should keep *in his own office* a list of all tax sales, open to public inspection, and this act also contains no provision for filing or recording such a report in the office of the recorder of deeds.

The fifth section of the act of February 28, 1898 (30 Stat., 252), provides that—

> "The collector of taxes shall, within twenty days after the last day of the sale hereinbefore provided for as aforesaid, *file* with the recorder of deeds a written report, in which he shall give a statement of the property sold, other than that sold to the District of Columbia, to whom it was assessed, the taxes due, to whom sold, the amount paid, the date of sale, the cost thereof, and the surplus, if any."

In the case of Bride *vs.* McFarland, 18 D. C., 120, the Court of Appeals decided that the act of March 3, 1877, and the several acts amendatory thereof constitute the tax laws of this District, and with reference to the act of February 28, 1898, said (p. 125):

> "In the first place, the act of 1898 *is intended as a general comprehensive system of procedure for the listing, advertising, and sale of property for*

taxes. It is not intended to be a mere auxiliary method prescribed to a preexisting method. *It was intended to take the place of a system previously prescribed,* in which it was supposed there were defects that required legislative change in detail, but not in the system itself. . . . It was intended to take the place of the system that had prevailed with the additions and modifications made thereto; and that being the case, it plainly comes within the principle that where two acts, though not in express terms repugnant, yet if the later act covers the whole subject of the first *and embraces new provisions* plainly showing that it was intended as a substitute for the first, it will operate as a repeal of that act; the presumption being that it was not the intention of the legislature that two or more acts relating to and covering the same subject-matter should remain in force together.

. . . . . .

"The act of February 28, 1898, was manifestly intended by Congress simply as *a substitute for all preceding legislation upon the subject of the method of proceeding for the collection of taxes and of making tax sales* of the property of delinquent taxpayers."

A comparison of the provisions of section 175 of the Revised Statutes with the fifth section of the act of February 28, 1898, shows that the two can not stand together. The earlier act requires the report to be made "within *ten* days," while the later prescribes "*twenty* days;" the earlier act requires the report to contain "the names *and residence* of the persons to whom such property *belongs* or to whom such taxes have been assessed," while the later only requires it to show "to whom it was assessed;" the earlier act requires the report to show "the clear surplus, if any, coming to the proprietor," while the later act does not.

The first act requires that the collector shall "transmit to the recorder of deeds" the report, "which report *it*

shall be the duty of the recorder forthwith to record among the land records," and further provides that "*the expense thereof shall be paid by the party who redeems the same,*" while the later act merely provides that the collector shall "*file* with the recorder of deeds a written report," making no provision for its record and no provision for *paying the expense of such record.*

By examination of the provisions of the revision regulating the office of the recorder of deeds, it will be seen that a distinction is made between cases of filing *and recording*, and mere *filing*. Section 470 fixes the fees, and "for filing, recording, and indexing" an instrument of two hundred words or less allows fifty cents and fifteen cents additional for each additional one hundred words, while for the mere service of "filing and indexing any paper by law required to be filed in his office, fifteen cents."

It is quite clear from the comparison of the two statutes that when Congress intended to have the tax collector's report *recorded* among the land records, it expressed that intent in plain and unmistakable terms. It not only specifically directed that it be *recorded*, but specified how the expense of its record should be paid. The testimony in this case shows that the recorded report required more than two volumes of about five hundred pages for its record (Rec., pp. 229–232–3). The cost of *filing* is only fifteen cents for the entire report, as provided by law, while for *recording* the cost is fifty cents for the first two hundred words and fifteen cents per hundred for all additional words, for which expense no provision is made in the late statute.

No necessity for its actual transcription into the record books existed. For the purpose of notice to purchasers, all the world is advised by the law of the right to tax the property and that the tax is a lien upon it, and a statute requiring a report to be made and filed or kept

in any public repository is notice to the world of the place in which information on the subject is to be found.

The unofficial copy or record of the report can not, therefore, take the place of the original, which the law requires to be filed and to which all persons rightfully interested are referred. Not only is this alleged record of the report unofficial, but the undisputed evidence in this case shows it to be grossly inaccurate in fact and not a true copy of the original. This is demonstrated by comparing the extracts of the first page from the copy or record in the recorder's office (Rec., 230–1) with the same extracts from the original (Rec., 470–1), and also the extracts from another page of the recorder's copy or record (Rec., 234–5) with the extract from the same part of the original (Rec., 160–1).

Thus, in the copy made in the recorder's books the signature "E. G. Davis, Collector of Taxes, D. C.," is wholly omitted from the formal report (Rec., 230), though it appears in the original (Rec., p. 470) and is appended, in the recorder's copy, to a descriptive memorandum or index (Rec., p. 231), where it does not appear in the original (Rec., p. 470.)

So, in the description of the property sold and to whom assessed, the recorder's copy reads "Maria T. Gillis, To whom assessed" (Rec., 234), while the original reads "To whom assessed, Maria T. Gilliss" (Rec., 160). So in the description of the items of sale, the recorder's copy reads "2 half tax for year 1898" (Rec., 234), while the original reads "2nd half of tax for year 1898" (Rec., 160). Various other omissions, interpolations, and transpositions in the copy will readily be seen upon inspection and comparison of the copy with the original, not necessary to be set out in detail, as sufficient has already been set out to demonstrate that the alleged copy is not a copy.

It is respectfully submitted, therefore, that the alleged record, being unofficial, is not evidence in and of itself,

and not having been properly proved or offered as secondary evidence, and being in fact shown to be inaccurate and not a copy, is inadmissible for any purpose; and further, the bill not having alleged any defect in the original, defects in that, even if shown to exist, could not be considered in derogation of the tax title, as the sound and well-established rule is that a party can no more prevail upon a case proved and not alleged than upon one alleged and not proved.

The Alleged Defects in the Report Set Out in the Bill of Complaint Do Not Exist in the Report.

b.

The first defect alleged is that the report—

> "is made *not by the collector of taxes*, but by John B. Wight, John W. Ross, and Lansing H. Beach, Commissioners of the District of Columbia" (Rec., p. 10).

The first essential to the consideration of this alleged defect is a proper understanding of the law governing the making of the report. The old law of 1819, afterward section 175 of the Revised Statutes relating to the District of Columbia, provided that the collector of taxes shall "transmit an accurate report in writing, *duly certified*," while the fifth section of the act of February 28, 1898, under which this report is made, provides that the collector of taxes shall—

> "file with the recorder of deeds a written report in which he shall give a statement of the property sold," etc. (30 Stat., p. 252).

There is no requirement in this law that it shall be "*made*" by him, that he shall sign it, or that it shall be "duly certified," as required by the old law, and his signature is not made an essential to its validity.

The evidence in this case is not disputed that he did sign the original report, and his signature appears thereon (Rec., p. 470). His signature also appears in the incorrect copy in the recorder's records, also, though not in the same place as in the original (Rec., p. 231), and as the law does not specifically require a signing, a signing upon any part of it and its subsequent filing, it is submitted, is sufficient evidence that it is his report, filed by his authority.

The formal portion of the report, to which his signature is appended in the original, is as follows:

> "We hereby certify that the following exhibit is a true statement of sales of property to individuals at the tax sale, April 12 to 19 (inclusive), 1899.
>
> "All other property delinquent and sold at said sale was bid in by and in the name of the District of Columbia.
>
> JOHN B. WIGHT,
> JOHN R. ROSS,
> LANSING H. BEACH,
> Commissioners of the District of Columbia.
> E. G. DAVIS,
> (Rec., p. 470.) Collector of Taxes, D. C."

It could not, with any reason, be contended that this is not his report if it were signed by him only, but the fact that the Commissioners also sign it is claimed to have a vitiating effect upon the whole report. If this contention be sustained and the report held to be irregular and the sale invalid, then not only *this* sale but *all* sales made in April, 1899, would be invalid, and the consequence would be that the District must return to the purchasers the entire purchase money, amounting, as the record shows, to $155,104.51 (Rec., pp. 161–62), because the sixth section of the act of February 28, 1898, requires

that if the sales are invalid and ineffectual to give title to the property sold, the Commissioners—

> "shall cancel the sale and cause the purchase money to be refunded to the purchaser, his representatives or assigns" (30 Stat., 252).

It is submitted that, by the terms of the statute, the signature of the Commissioners, in addition to that of the collector, did not make it *their* report and not *his*, nor in any respect vitiate his act. On the contrary, in view of certain other provisions of the statute, it was eminently proper that they, also, should sign the report.

The second section of the act of February 28, 1898, provides that—

> "upon the day specified, aforesaid, the *Commissioners* shall proceed to sell, or *cause* to be sold, any and all property upon which such taxes remain unpaid, and continue to sell the same every secular day, until all the real property, as aforesaid, shall have been brought to auction and sold" (30 Stat., 250).

Their signing the report was, therefore, an evidence that the sale was made by them or by their authority. Without that it might be questioned whether they had themselves made the sale, or had authorized another to do so. By signing the report of the collector they recognized and admitted their knowledge and sanction of the sales. If made by themselves, attested the fact. If made by another, they thus attested that they had *caused* it to be sold. It would be in the highest degree unreasonable to hold that the report, signed by the collector, was not his report within the meaning of the statute, merely because those whom the statute authorized "to sell or cause to be sold" the delinquent property had also signed the report, in evidence of the due authority for the sale.

The mere fact that the law did not require the report to show by whom the property was actually sold, and if not by the Commissioners themselves, then that they had caused it to be sold, would not render the report invalid because it did show that fact. Including such a showing in the report would be a mere superfluity, affecting no rights and in no respect altering the legal effect of the report.

As above shown, the fact that they sign the report is properly to be regarded as evidence that they had either themselves sold or else caused the property to be sold, but if not so treated it is nothing more than their attestation of the correctness of the collector's report, which, however unnecessary it might be, could not invalidate it.

c, d, e, f, g.

The substance of the allegations in these subparagraphs is that the report is defective in that it does not set forth, as required by the statute, (*c*) the taxes due, (*d*) the amount paid at the sale, (*e*) the date of the sale, (*f*) the cost of the sale, and (*g*) to whom it was sold (Rec., p. 10).

An inspection of the report will show that it is arranged in tabular form and that it sets forth the taxes for which sold as being the "2d half of tax for year 1898," and the amount as "128 50," and "penalty" of "14 13" (Rec., p. 160), thus clearly designating the taxes due for which the sale is made. There is also added the "advertising" "1 20" (Rec., p. 160), the only cost of sale allowed to be charged, as specified in section 7 of the act (30 Stat., 252), with the aggregate of "143 83" footed at the bottom of the column under "amount sold for" (Rec., p. 160), thus plainly showing the tax, penalty, the only authorized cost of sale, and the total amount for which sold.

The table is headed "Real Estate Tax Sale, District of

Columbia, April —, 1899," while in the column giving the specific date is the date of "April 13" (Rec., p. 160).

Under the caption of "purchaser" is given, in the next preceding parcel, the name of "C. H. Wiltsie," immediately under which is placed the usual abbreviation for ditto, "do." (Rec., p. 160), showing Wiltsie to be the purchaser of this parcel also.

It is respectfully submitted, therefore, that this report does, in all substantial respects, answer the requirements of the statute, and that there is nothing in it which could be held to be in any way misleading.

That these alleged criticisms of the report are without real merit, if not frivolous, must be apparent on examination of the statute. The report has *no relation to the assessment or sale* and can not affect either, since it is a requirement *subsequent* to the assessment and sale, after which there are no rights to be affected *except the right of redemption.* As to this right, it is plain, from the statute, that the mere *fact* of sale is the only matter in the report in which one having the right to redeem is interested or in anywise concerned.

If every other statement in the report than the bare fact that the property had been sold were erroneous it could not, in any way, mislead or injure one having the right to redeem.

The provision of the law as to redemption is contained in the fourth section of the act, and is as follows:

> "That the owner or authorized agent of the owner of any property sold as aforesaid, or any other person having an interest therein at the time of sale, may redeem the same from such sale at any time within two years after the *last day of sale* by paying to the *collector of taxes for the use of the purchaser, his heirs and assigns,* the sum mentioned in the *certificate of sale* therefor, with interest thereon at the rate of fifteen per centum per annum after the *date of such certificate of sale,* together with any tax or assessment

> which the holder of said certificate shall have paid between the days of sale and redemption, with interest on the same at the rate of ten per centum per annum" (30 Stat., 251–2).

The important fact of the *time* for redemption can not be ascertained from the report. The time for redemption does not begin to run from the *date of sale*, which the report is required to give, but from the "*last day of sale*," which the report is *not* required to state. The amount required to redeem is not the *amount of the tax due*, or for which the *property was sold*, or the *costs of sale*, as stated in the report, but the "sum mentioned *in the certificate of sale*," with fifteen per centum interest thereon, not from the date of sale or even the last day of sale, but from the "*date of such certificate of sale*," together with any taxes which the holder of the certificate may have paid in the interim, with interest upon that sum at ten per centum per annum.

Nor is the property to be redeemed from the person *to whom sold*, as shown in the report. The payment is not permitted to be made to the person to whom the report shows it to have been sold, but is to be to the "*collector of taxes*, for the use of the purchaser, *his heirs and assigns*," the collector being thus made the agent of whomsoever at the time may be the holder of the certificate. This is essential, because, as the certificate is assignable, the owner would have no means of discovering the holder of the certificate and of making payment to him.

From these provisions of law it is seen that the only fact which the report shows which could affect the right of redemption is the fact that sublot A, in square 432, was sold, which fact is not denied by the bill and plainly appears in the report, and payment must be made to, and all necessary information for the purposes of redemption obtained from, the collector of taxes.

Even if the objections to this report were well founded in fact, they are shown to be frivolous in law, since they affect no right of any party in interest. By law any party in interest is required to seek elsewhere for the facts as to the time for redemption, the amount to be paid, and the person holding the certificate of sale.

Had the complainant in this case sought to redeem, the time for redemption would not have run from April *thirteenth*, the day of sale, but from April *nineteenth*, the last day of sale. The amount to be paid would not have been the amount stated in the *report*, but the amount stated in the certificate of sale, with fifteen per centum interest from April *twenty-fifth*, the date of the certificate, and intervening taxes, if any, paid by the certificate holder with ten per centum interest. And payment could not be made to Wiltsie, the purchaser named in the report, but must have been made to the collector of taxes.

IV.

Costs Should Not Have Been Adjudged Against These Appellants.

The decree of the court below adjudges the defendants, Kann and Cohen, to pay one-half the costs in this case (Rec., p. 483).

Counsel is unable to comprehend upon what principle this condemnation to costs is based. No one of these appellants had done any act against the complainant or taken any steps to enforce the tax title against the lessor. The lessor had invited them to become tenants, and had actually taken steps to enforce the forfeiture against the lessee before these appellants had acquired the tax title, which the complainant had refused to buy because she could not secure it at her own price, and which the lessor's counsel had also declined to buy when Cohen suggested that he do so.

The only acts done by the appellants, up to the time the bill was filed, were to acquire, by purchase, the tax title, and to offer to surrender it to the lessor upon terms satisfactory to the lessor.

The court has said, in its opinion, that the conduct of these appellants is "wholly untainted by wrong-doing" (Rec., p. 491), yet they are condemned to pay one-half of the very heavy costs in this litigation, occasioned solely by the complainant's breach of contract and subsequent wilful refusal to repair the breach at trifling cost when given the opportunity to do so.

It is respectfully submitted that the decree appealed from should be reversed, with costs, and the cause remanded to the court below, with directions to enter a decree dismissing the bill at the complainant's cost.

WM. G. JOHNSON,
Counsel for Appellants.

FILE COPY.

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FEB 8 1906
JAMES H. MCKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]17

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING.

BRIEF OF APPELLANT.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
E. S. THEALL,
Counsel for Appellant Webb.

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 203.

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING.

BRIEF OF APPELLANT.

Concise Statement of the Case.

This is an appeal from a final decree rendered by the Court of Appeals of the District of Columbia on the 8th day of March, 1905. (Rec. p. 492.)

On the 4th day of December, 1901, the appellee, Caroline King, filed her original bill in equity in the Supreme Court of the District of Columbia against Marianne A. B. Kennedy, Myer Cohen, Sigmund Kann, and Louis Kann, defendants. This bill, filed by the complainant as tenant of the defendant Kennedy, sought relief from a forfeiture of a lease of premises No. 715 Market Space, in the city of Washington, District of Columbia (Rec. pp. 1–13). It is sufficient to summarize the contents of the pleadings as follows:

The complainant claimed that her husband, Henry King, Jr., on July 8, 1890, leased from the defendant Kennedy the said premises for a term of three years

from the 1st day of October, 1890, and that said lease was, by sundry agreements between the parties thereto, extended until the the 1st day of October, 1908; that her husband died on the 15th of August, 1897; that on the 26th day of the same August the said lease was for a valuable consideration assigned to her by her husband's administrator c. t. a., which assignment was consented to by the defendant Kennedy; that in the said lease, among other conditions, was one which provided that all taxes should be paid by the tenant, under penalty of a forfeiture of the said lease in the event of non-payment; that her assignor, Henry King, Jr., and herself, performed all the covenants on his part in said lease contained, save that she omitted to pay the instalment of taxes due upon the demised property for the second half of the fiscal year ending June 30, 1898; that this omission was accidental, and occasioned in part by mental anxiety and distress in consequence of the death of her husband and of the embarrassed condition of his affairs; that on the 13th day of April, 1899, the premises were attempted to be sold on account of the failure to pay the said taxes, and were bought by one C. H. Wiltsie, of Rochester, N. Y., for the sum of one hundred and forty-three dollars and eighty-three cents ($143.83), the property at that time being worth not less than fifty thousand ($50,000) dollars; that the omission to pay said taxes and the consequent sale and the issuing of the certificate therefor were unknown to the complainant until the month of July, 1901; that at said last named time the said Wiltsie informed her that he held this certificate and was willing to sell the same, but demanded an excessive price; that thereupon negotiations ensued between Wiltsie and her son, which were pending in September, 1901; that in said September, Henry Randall Webb, then the attorney and agent of the defendant Kennedy, learned of said default, sale, and certificate; that thereupon certain interviews and nego-

tiations ensued between the said Webb and Kennedy and the defendants Cohen and Sigmund and Louis Kann, as the result whereof the defendant Kennedy determined to forfeit the said lease by reason of the said non-payment of taxes and the consequent sale, and to rent the said premises to the defendants Kann at an advance of twelve hundred ($1,200) dollars per year; further, that the defendants Kann authorized said Cohen to purchase the tax title from the said Wiltsie and to hold it for their purposes in connection with enforcing the forfeiture and securing a lease; that the defendant Cohen informed Webb that he was going to buy the tax title and hold it at arm's length; and thereupon, with the acquiescence of the said Webb, proceeded to Rochester, N. Y., where the said Wiltsie lived, and bought the said tax title from him, taking an assignment of the certificate; that at this very time the certificate had been sent by Wiltsie to a Washington bank in order that the complainant might purchase it, and that she would have made this purchase at once had she known of the intended purchase by the defendants Kann; that the purchase by the defendants Kann was collusive between them and the said Kennedy and Webb, and was made only in furtherance of the common design of forfeiture and the giving possession of the demised premises to the defendants Kann; that the movements of said Cohen to Rochester and back to Washington were very expeditious, and that in two days he had made the purchase and converted the tax certificate into a tax deed; that on the last day of September, 1901, the complainant tendered her monthly instalment of rent to the defendant Kennedy in ignorance of the said projected forfeiture, and received notice that the forfeiture would be enforced; that thereupon the complainant sent to the bank in question, intending to take up the said certificate, but found that it had been returned to Rochester; that she subsequently learned that

the defendant Cohen had bought the said certificate and taken the tax title in his own name ; that on the 4th day of October, 1901, she endeavored to purchase from the said Cohen the said tax title, offering him a liberal price therefor, but that he refused; that during the same month of October she endeavored to procure from the defendant Kennedy permission to use her name in litigation for the purpose of annulling the said tax title, offering to indemnify her, but was refused such permission; that thereafter the defendant Kennedy, upon the advice of her physician and friend, Dr. Fry, determined to waive the said forfeiture and reinstate the lease; that when the defendants Kann learned of this change of intention they notified the defendant Kennedy that she must either give them the lease, as agreed upon, or defend her property against the tax title which they held; that thereafter, on the 9th day of November, 1901, the defendant Kennedy, in consequence of this threat, entered landlord and tenant proceedings against the complainant for the possession of the demised premises; that the said alleged tax sale is absolutely void by reason of certain defects therein, which are set out in detail; that the defendants Cohen and Kann knew of the invalidity of the said tax sale when they bought the said certificate.

The prayer of the bill is for relief from the forfeiture and for injunction against landlord and tenant proceedings and for an adjudication of the invalidity of the said tax sale and an injunction against the defendant Cohen and the defendants Kann from setting up the same.

As has been said, this original bill was filed on December 4, 1901, and on the same day a restraining order, as prayed in the bill, was issued (Rec. p. 25).

On the same day the defendant, Marianne A. B. Kennedy, died, and on the 7th of March, 1902, a bill of revivor was filed (Rec. pp. 26–29). This bill of revivor, after reciting the purpose of the original bill and the

proceedings had thereupon, averred the death of Mrs. Kennedy and set forth the contents of her last will, substantially to the effect that all of her property was devised to Henry Randall Webb, in trust to sell the same and out of the proceeds thereof to pay certain legacies, amounting to about $40,000; that the said property very largely exceeds in value the amount of the said legacies and that there will remain a large surplus descending to Maria Gillis Dewey as sole heir at law and next of kin of the testatrix; that Henry Randall Webb has qualified as executor of said will, and has signified his intention of dispossessing the complainant from the premises described in the original bill; that process may be issued against said Webb and Dewey, making them parties to the proceedings, and that the said Webb may be enjoined from attempting to dispossess the complainant.

On the 4th of April, 1902, a supplemental bill was filed by the complainant, the only material averment of which is that the defendant Webb has actually instituted landlord and tenant proceedings against her to oust her from the premises in controversy (Rec. pp. 29–31). The supplemental bill prays specifically that the defendant Webb may be enjoined from proceeding with the landlord and tenant suit.

On the 4th day of April, 1902, the defendant Webb was restrained, as prayed in the supplemental bill, until the further order of the court (Rec. p. 33). The injunction undertaking will be found at page 34 of the record, and is signed by the plaintiff and her son, Harry King.

Answers to the original bill, the bill of revivor, and the supplemental bill were filed as follows:

By the defendant Dewey, on April 15, 1902 (Rec. p. 35).

By the defendant Myer Cohen, on the 18th day of April, 1902 (Rec. pp. 36–54).

By the defendants Sigmund and Louis Kann, on April 18, 1902 (Rec. pp. 63–74).

By the defendant Webb, on April 18, 1902 (Rec. pp. 77–85).

The answer of the defendant Dewey is merely formal and admits that she is the heir at law, but denies that she is the next of kin, of the said Kennedy. The answers of the defendants Cohen, Sigmund, and Louis Kann, and Webb, in so far as it is necessary to state them here, are to the effect that none of them knew anything of the default made by the plaintiff in the payment of taxes in question until the times next hereinafter stated; that about the 19th or 20th of September, 1901, one Knight notified one of the Kanns of the tax sale, and that he thereupon spoke of the same on the next day to the defendant Cohen; that Kann referred Knight to Webb as attorney for the owner, Mrs. Kennedy; that on the afternoon of September 25, 1901, Knight informed Webb that the property had been sold for taxes and that the tax sale was invalid, and wished Webb to employ him to cancel the said sale; that on the next day Webb consulted the records and found that the tax sale was irredeemable, and also found that the property had been on another occasion sold for taxes and redeemed by the complainant in May, 1901; that thereupon Webb advised his client of the situation and of her legal rights in the premises; that on September 30, 1901, Webb called upon Cohen, he being then attorney for the Kanns, and inquired whether or not they were still willing to pay $300 a month rent for the premises in question, as they had offered to do some months before; that on the same day Cohen informed Webb that the Kanns would lease said premises on the terms stated, provided they were given possession thereof and their said offer was not used as a means to compel the complainant to pay higher rent; that Mrs. Kennedy, upon having this fact communicated to her, determined to forfeit the lease and to give a new lease to the Kanns; that on the same day, in the afternoon, Webb

was informed by Cohen that he (Cohen) was going to Rochester to purchase the tax certificate in question from the holder thereof, one Wiltsie; that Webb endeavored to dissuade him therefrom, but without success; that thereupon Cohen went to Rochester the same night, purchased the said certificate from Wiltsie, returned at once to Washington, and had the proper authority execute to him a deed of the tax sale in question; that when Cohen reached Rochester he learned for the first time that negotiations had been pending for some (8) weeks between the complainant and Wiltsie for the sale of the tax title in question to her; that there was no collusion between Webb and Cohen and the Kanns, or between Webb and any of them in this purchase; that a little later, through the intervention of Mrs. Kennedy's friend and physician, she wavered as to her course and determined to waive the forfeiture, provided the complainant would extinguish the tax title and secure her; that subsequently the defendants, the Kanns and Cohen, through their counsel, represented to Mrs. Kennedy that she would either have to give them a lease for the sum agreed upon, to-wit, $3,600 a year and taxes, in which event they would cancel the tax title in her favor, or if she gave a new lease to the complainant she would have to fight the tax title; that thereupon, the complainant having failed to secure her, Mrs. Kennedy determined to adhere to the declaration of forfeiture, and authorized the landlord and tenant proceedings to recover possession of the premises. These answers were supported by affidavits, the averments of which it is not material to refer to here.

The cause came on for a preliminary hearing on the bills and the answers thereto, and on the 28th of June, 1902, Clabaugh, C. J., granted an injunction *pendente lite*. (Rec. p. 106.) On July 2, 1902, the defendant Webb prayed a special appeal to the Court of Appeals of the District of Columbia from said order. (Rec. p. 108.)

This appeal constituted cause No. 1241 upon the docket of that court and was heard in December, 1902. On January 20, 1903, the opinion of the court was delivered by Mr. Justice Morris, and will be found reported in 21 App. D. C., pp. 141–153.

Thereupon the cause was remanded to the Supreme Court of the District of Columbia, and testimony was taken, beginning on the 20th day of February, 1903, and concluding on the 8th day of June, 1904. The cause came on for final hearing upon the pleadings, and all of the testimony and exhibits, in June, 1904, and on the 30th day of that month the final decree was made by Anderson, J., whereby the tax sale in question was decreed to be null and void, and the defendants Cohen and the Kanns were permanently enjoined from asserting the same; the defendants Webb and Dewey were enjoined from enforcing any forfeiture by reason of the said sale upon the payment into the registry of the court of the amount of taxes, in default of payment whereof the said sale was made; the plaintiff was decreed to pay one-half of the costs, and the defendants Cohen and the Kanns were decreed to pay the remaining half (Rec. pp. 480–484).

From so much of this decree as affected them, the defendants Cohen and the Kanns separately appealed; from so much of it as affected the defendant Webb, he, severing from his co-defendant Dewey, appealed (Rec. p. 482).

This appeal was heard in the Court of Appeals of the District of Columbia, in February, 1905 (Rec. p. 487), and on March 8, 1905, that court delivered its opinion (Rec. pp. 487–491), affirming the decree of the lower court in the premises (see, also, 25, App. D. C. p. 182). The decree of affirmance was entered the same day (Rec. p. 492).

From this final decree the appellant Webb duly appealed to this court, had his appeal allowed, and filed

his supersedeas bond which was duly approved (Rec. pp. 492–495). The cause comes on now in this court to be heard upon that appeal.

The questions involved are:

1st. Do the pleadings and the testimony establish such a case as entitle the complainant to relief in a court of equity against an admitted forfeiture of a lease by breach of a covenant on the part of the lessee (complainant), to pay all taxes accruing during the demised term?

2nd. Is such breach one that can be compensated to a landlord?

3d. Must the landlord in such case make any demand upon the tenant before declaring a forfeiture, and, if so, for what?

4th. Where the tenant has covenanted to pay all accruing taxes upon the demised premises, what, if any, duty rests upon the landlord, as between the tenant and himself, to keep watch upon the tenant's possible defaults and to avoid their consequences?

5th. Do the acts of the landlord, in herself paying these taxes (she collecting them from the tenant) down to a certain date, relieve the tenant from her covenant to pay taxes subsequently accruing?

6th. What diligence must a complainant use who applies to a court of equity for relief against a forfeiture declared by the landlord on account of such a breach?

7th. Where the tenant has not only allowed the demised premises to be sold for taxes, but has continued his breach until a tax deed for the demised premises has issued to an assignee of the purchaser, can the tenant litigate the question of the validity of that tax sale with the holder of the tax title at the risk of the landlord?

8th. Is not a bill in equity which attempts to enjoin the enforcement of a forfeiture declared by the landlord

by reason of such a breach, and also to adjudicate the validity of such tax sale, multifarious?

9th. Was not the lease in question procured under such circumstances (disclosed by the evidence) as will induce a court of equity to look unfavorably upon it?

10th. Do the pleadings and the evidence disclose any case of fraud on the part of the defendant, or of accident or mistake on the part of the complainant, which would constitute a ground of equitable relief?

11th. Has not the complainant been guilty of such laches as disentitle her to relief?

12th. In any case can a defaulting tenant have relief from a forfeiture save on the condition of paying all costs and reasonable counsel fees to the landlord incurred in resisting such relief?

Specification or Assignment of the Errors Relied Upon by Appellant.

1. The Court of Appeals erred in determining each of the twelve foregoing questions (each of which is hereby repeated as a specification and assignment of error) adversely to the contentions of the appellant.

2. That court erred in not reversing the decree of the Supreme Court of the District of Columbia in the premises, and in not dismissing the original bill and the bill of revivor and the supplemental bill, upon the ground that the said bills and the testimony taken in support thereof did not establish such a case as a court of equity should relieve.

3. That court erred in granting a permanent injunction against the defendant Webb upon the pleadings and testimony in said cause.

4. That court erred in holding that the case estab-

lished by the said bills and the testimony taken in support thereof entitled the plaintiff to equitable relief.

5. That court erred in holding that the averments of the said bills, and the testimony taken in support thereof, established such a case of surprise or mistake or inadvertence on the part of the complainant as a court of equity should relieve.

6. That court erred in holding that any acts of the defendants or any of them, as set forth in the said bills and the testimony taken in support thereof, constituted a ground of equitable relief in favor of the complainant.

7. That court erred in holding that the complainant was not guilty of such laches in the premises as barred in a court of equity any claim on her part for equitable relief in the premises.

8. That court erred in holding that the said bills were not multifarious.

9. That court erred in not requiring the plaintiff to pay the whole costs of the case and also reasonable sums to the defendant Webb, as compensation for sums paid by him as counsel fees and also for printing briefs and other necessary expenses.

BRIEF OF THE ARGUMENT.

The lease in question is as follows (Rec. pp. 13–15):

> "This indenture made this eighth day of July in the year of our Lord eighteen hundred and ninety, between Marianne A. B. Kennedy of the city of Washington in the District of Columbia, of the first part, and Henry King Jr. of the same place, of the second part, witnesseth.
>
> "That for and in consideration of the rents and covenants hereinafter reserved and contained, the

said party of the first part has let and demised, and by these premises does let and demise, unto the said party of the second part, that certain messuage, situate on Market space, that is to say, on the north side of Louisiana avenue, between Seventh and Eighth streets, northwest, in the aforesaid city of Washington, and numbered '715,' together with all and singular the store fixtures and other fixtures now in and about said messuage and belonging or pertaining thereto, as the property of the said party of the first part, and together, also, with the ground on which said messuage stands and all its appurtenances thereto belonging, or in anywise appertaining, for a term of *three years* from and next after the first day of October, eighteen hundred and ninety, upon the following and upon each of the following conditions, that is to say, upon condition—

"First. That the rent hereinafter reserved and every instalment thereof, shall be punctually and promptly paid to the said party of the first part and her assigns in the manner and at the time or times hereinafter mentioned for the payment thereof.

"Secondly. Upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will use and occupy the store part or portion of said messuage as, and only as, a fancy or dry-goods store, and the remaining part or portion of said messuage, either as and for a dwelling-house or as and for offices.

"Thirdly. Upon condition that the said party of the second part his executors, administrators or assigns, shall not, during the continuance of the aforesaid term, either assign or sublet the said demised premises or any part thereof, without first obtaining the consent in writing, of the said party of the first part to such assignment or sublease.

"Fourthly. Upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors, administrators or assigns, shall and will, at his or their cost and

expense, keep the said demised premises and every part thereof, in good repair and condition, excepting only such repairs as may be rendered necessary by accidental fire.

"Fifthly. Upon condition that the said party of the second part, his executors, administrators, or assigns, will, during the continuance and until the end and determination of the said term for which the said premises are demised, *pay or cause to be paid in each and every year thereof*, the taxes, general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government.

"Sixthly. Upon condition that, at the expiration or other sooner determination of the aforesaid term, the said party of the second part, his executors, administrators, or assigns, shall and will peaceably and quietly yield up and surrender to the said party of the first part, her heirs or assigns, the said demised premises and every part thereof, in good condition and repair, excepting only reasonable wear and tear and such repairs as may be rendered necessary by accidental fire as aforesaid; and,

"Seventhly. Upon condition that, during the continuance of the aforesaid term, the said party of the second part, his executors or assigns, shall and will pay to the said party of the first part, an annual rent of twenty-four hundred dollars ($2400.) for the aforesaid demised premises, in and by equal monthly instalments of two hundred dollars ($200.) each, on the last day of each and every month during the continuance of the aforesaid term, and subject to the aforegoing conditions, and each of them,

"To have and to hold the said demised premises unto the said party of the second part for the term of three years from and next after the first day of October, 1890, as aforesaid.

"And the said party of the second part, having accepted, and now again accepting the said demised premises for the term aforesaid, upon the

conditions and every of them hereinbefore mentioned and set forth doth, by these presents, for himself, his executors, administrators, and assigns, covenant, promise, and agree to and with the said party of the first part, that he, the said party of the second part, shall and will well and truly observe, keep, obey, and perform the aforesaid conditions and every of them, according to their and its true intent and meaning; and further,

"That if he, the said party of the second part, his executors, administrators, or assigns, shall at any time or times refuse, neglect, or fail well and truly to observe, keep, and obey, and perform the aforesaid conditions and every of them, according to their or its true intent and meaning, then, at the option or election of the said party of the first part, the aforesaid term and every unexpired part thereof, shall instantly cease and determine (anything herein contained to the contrary, notwithstanding), and be thereafter utterly null and of no effect; and it shall thereupon, at her option and election, be lawful for the said party of the first part into and upon the said demised premises, and into and upon any and every part thereof, wholly to reenter and the same to have again, repossess and enjoy, as in her first and former estate, as fully as though said demise had never been made.

"In testimony whereof the said parties hereto have respectively hereunto set their hands and seals on the day and year first hereinbefore written.

"(Signed) MARIANNE A. B. KENNEDY. [SEAL.]
"(Signed) H. KING, JR. [SEAL.]

Witness:
MYER COHEN.

It will be observed that the forfeiture and reentry clause is general and applies to the breach of several conditions. This would be a material circumstance if

the question were whether or not a certain sum of money, to be paid upon the violation of these conditions, or any of them, were to be regarded as a penalty or as liquidated damages.

1 Pomeroy's Eq. Juris., secs. 441, 446.

But the principle extends no further than this, as is evident from the following authorities, cited below by counsel for the appellee in contending that the same principle applied generally :

The case of *Astley* v. *Weldon*, 2 B. & P. 346, was one in which there was a contract between a manager and an actress, containing various covenants; one to pay the actress a certain sum per week, and, also, traveling expenses ; another by the actress to perform certain acts, the violation of which was, by the regulations of the theater, subject to a small fine. It was provided that if either neglected to perform the agreement, he or she should pay to the other two hundred pounds. It was held, in accordance with the elementary rule of law, that this was a penalty and not liquidated damages, since, amongst other things, payment of several smaller sums was secured by a larger sum.

In the case of *Kemble* v. *Farren*, 6 Bing. 141, there was an agreement that a manager should, amongst other things, pay an actor a certain sum per night. It was provided that if either party should break any part of the agreement he should pay the other 100 pounds, to be liquidated damages. The defendant refused to act during the second season, and the manager brought suit. It was held that the sum mentioned was a penalty, since it, a very large sum, might become immediately payable for the non-payment of a very small sum.

In the case of *Horner* v. *Flintoff*, 9 M. & W. 680, the court held a certain sum stipulated to be paid for the

breach of a covenant to be liquidated damages, and not a penalty.

In the case of *Price* v. *Green*, 16 M. & W. 354, a stipulation to pay 5,000 pounds as liquidated damages for the breach of a covenant was held to be liquidated damages, and not penalty.

In the case of *Dakin* v. *Williams*, 17 Wendell, 448, the same thing was held; and the court says that it can not protect people from improvident bargains.

In the case of *Shreeve* v. *Brereton*, 1 P. F. Smith (Pa.), 175, a stipulation to pay $10,000 as liquidated damages for the breach of certain covenants, among which were the payments of smaller amounts of money, was held to be a penalty.

In the case of *Lampman* v. *Cochran*, 16 N. Y. 275, the same thing was held.

No discussion is required to show that the principle applied in these cases is entirely inapplicable to the case under consideration.

QUESTION I.

Do the pleadings and the testimony establish such a case as entitle the complainant to relief in a court of equity against an admitted forfeiture of a lease by breach of a covenant on the part of the lessee (complainant) to pay all taxes accruing during the demised term?

Before this question can be answered it must be ascertained in what cases courts of equity will relieve a tenant from forfeiture incurred by a breach of his covenant.

Consideration of cases involving fraud, accident, or mistake will be deferred.

Reference will be first made to English authorities.

There is printed in Appendix A to this brief an extract from the standard English treatise of Platt on Leases,

which is a historical review as well, also, as a critical consideration of the English statutes and adjudged cases on this subject. Pages 1 to 9 of this appendix discuss the relief which will be granted, both at law and in equity, from forfeiture occasioned by non-payment of rent.

This relief rests entirely upon the ground that a failure to pay rent at a day certain is compensated by a payment at a later day of that sum with interest, costs, and expenses, if any. But even here, if breaches of covenants, for which the lessee might be ejected, and against which the court could not relieve, be proved, it will not relieve against a breach for non-payment.

Bowser v. *Colby*, 1 Hare, 109, 134.
Home v. *Thompson*, Sause & Scully's Rep.

So, also, a case might exist in which a tenant might, by conduct, deprive himself of his right to redeem, although no covenant, other than for the payment of rent, might have been broken.

Bowser v. *Colby*, 1 Hare, 109, 138.

When we turn from covenants to pay rent to covenants to repair, not to assign, to pay taxes, and to insure (to mention the more important only), we are at once impressed with the difference in consequences resulting from a breach of these as contrasted with the covenant to pay rent.

Possibly the landlord may be greatly inconvenienced by the failure to receive his rent when due; but in contemplation of law such results are extraordinary, and can not be made the basis of any general rule of damages. Legal interest is generally full compensation for the mere withholding of money due.

But when you pass this line you get beyond the relief of the law, *because the law can not estimate the damage of a breach.*

Your tenant agrees to insure, but fails to do so. You find, upon inquiry at the insurance office, that you have been subject for one year to loss by fire. How can the law estimate your damage? Upon what principle can it force you to retain that tenant, and to run a risk with him again during the whole unexpired term of his lease? The covenant on his part to insure was one of the considerations which induced you to make the lease to him. The law can not deprive you of the benefit of that covenant without departing from its elemental principles. Nor can the law require you to constitute yourself his guardian and to be on the watch to anticipate and render harmless his breaches of contract by your own prudence or voluntary discharge of his obligations. Equally as serious or even more serious considerations apply to the covenant existing in the case at bar. If a man's property be sold for taxes and the period of redemption expire, his property has gone more completely than if fire had swept his house away. Is he to be told that the particular tax sale is invalid? That is not his damage. He has a dangerous tenant; the covenant to pay taxes has lost its value; he must no longer rely on his tenant, but must, under peril of a valid tax sale, disregarding the covenant, himself pay the taxes, and then recover them from his tenant; or he must be at the trouble of seeing that the tenant performs a continuing contract duty, and in default must perform it for him. For these obvious reasons the English courts have held that no court can estimate the damage which a landlord suffers from the breach of such contracts as these.

The case of *Rolfe* v. *Harris*, 2 Price 206 (220) n., involved the question of relief against a forfeiture for breach of a covenant to insure. The Vice-Chancellor (Sir Thomas Plumer) said:

> "That brings us to the third object of the bill—whether the court ought to give the relief sought

against the forfeiture, for the breach of the covenant? and that is certainly a very important question.

"By the terms of the lease, the tenant was bound to keep the premises in repair, without any exception in case of fire. Under that covenant he was an insurer to the landlord, as far as his responsibility went; but not choosing to depend on that alone, he insists on the further security of an insurance in one of the public offices. Notwithstanding the covenant, the tenant did not insure from 1807 to 1809, when the landlord gave him notice to perform the covenant; and his attention being thus called to it, he did insure for one year; but, at the expiration of that policy, he omits to renew it; and when asked whether he has insured, it appears that his answer is, not that he intended to insure, but that he had not, and would not without receiving a regular notice. Now, though he had previously been given a notice, it was more than he was entitled to; and the defendant might have ejected him without, upon the first omission, for the breach of covenant. But all notion of inadvertence was thereby excluded; and if it were not so, the covenant amounts to a condition, that the tenant shall hold no longer than whilst he insures.

"His honor then went at large into the authorities (*all of which are cited in the principal case*), from which he adduced the following principles, as the general result and effect of the decisions: That where the court will relieve, the omission and consequent forfeiture must be the effect of inevitable accident, and the injury or inconvenience arising from it must be capable of compensation; but that where the transgression is wilful, or the compensation impracticable, the court will refuse to interfere. If the latter branch of the doctrine were not established to restrain the latitude of the jurisdiction, it would be a most dangerous jurisdiction, as was well observed by Lord Eldon, who asks, what is there to govern a court

of equity in the exercise of such a discretion? The decision in *Sanders* v. *Pope* appears to have been founded rather on *dicta* than authorities, and goes further than the authorities warrant.

"*Why, in such cases as these, of relief against breach of contract, is a court of equity to be called on to make a new contract? The parties agree that, if the condition be broken, the lessor shall reenter; and the court is asked to give damages instead. What damages can the court give? And what damages would reconcile a man to a tenant who breaks his contract and brings his landlord before a court of equity by a bill, to be relieved against the effect of his own injurious neglect, and to defeat the landlord's remedy for the breach of the condition on which he holds, because he has done so? It seems to me to be a mischievous and arbitrary jurisdiction; and, if exercised at all, ought to be confined to cases of a pecuniary nature, such as non-payment of rent, and money not paid by a day certain, and where such breaches stand alone.*

"In such cases, perhaps, compensation may be made; but when the principle of compensation is applied to other cases, such as waste, and not repairing, it becomes very difficult, if not impracticable, to effect it. The only mode of measuring damages is by an issue *quantum damnificatus;* and that may turn out to be wholly unsatisfactory, and, in many instances, not capable of being carried into effect by any means, as in breaches of covenant for assigning without leave. *In this very sort of case, too, how can we, when a risk has been run, estimate the quantum of that risk in damages? This is such a breach of covenant as is out of the measurement of damages; and the effect of giving the relief prayed would be, that any tenant may hereafter break this special covenant with impunity, and every landlord must be content to take his tenant for his insurer, for want of power to enforce his covenant.* Whatever may be done, therefore, in general cases, the court

ought not to relieve in forfeiture for breaches of the covenant to insure. I should have been of the same opinion, if I were not so well borne out by authorities on this point as I find I am. Having stated the case of *Wadman and Calcraft*, and observed that the question there was distinctly whether the power to relieve was restricted to cases of non-payment of rent; and having averted to the other cases, the effect of which is to confine the jurisdiction of the court, in applications for relief against forfeiture, his honor particularly and emphatically took a view of the case of *Reynolds* v. *Pitt*, 19 Vesey, 134. That case, he observed, was precisely in point with the present in all its circumstances, and proceeded on a breach of the same covenant (for trivial distinctions should not be introduced in important cases), and that alone would be a sufficient authority for refusing the relief sought.

"Upon principle, therefore, and precedent, I am of opinion: That I am not warranted in giving the relief prayed against the forfeiture; and I think that in no part of this case ought the plaintiff to be relieved."

In the case of *White* v. *Warner*, 2 Merivale, p. 459, there was a motion for an injunction to restrain the defendant from suing at law upon the breach of a covenant to keep premises insured from fire. It was represented as a case of great hardship, the plaintiff having laid out £3,000 in repairs on the premises. Lord Eldon refused the injunction. He said that he had looked carefully into the cases, and that they did not bear out the proposition which was meant to be inferred from them, that the court will, in cases of forfeiture for breach of covenant, give relief upon the principle of compensation; that the omission to insure was stronger against the tenant than the omission to repair, because in the latter case the landlord may, by exercising due vigilance, see to the observance of the covenant; but in the former, where he

also has undertaken to keep insured, the landlord must rely upon him for the fulfilment of his obligation.

In the case of *Green* v. *Bridges*, decided in 1830, 4 Simmons (p. 96), Vice-Chancellor Shadwell had before him the case of a bill filed by a tenant for relief against the breach of a covenant to insure. This was also a case of hardship, because the tenant had spent money in improving the premises. In that case there had also been an insurance in the name of the tenant. The Vice-Chancellor said (p. 101):

> "I have a perfect recollection of the case of *Reynolds* v. *Pitt*. It was first decided in the Court of Exchequer. The same point came before the Master of the Rolls, and his decision was affirmed by the Lord Chancellor. I was counsel in the cause throughout. I remember that Lord Eldon, when he delivered his judgment, gave a minute analysis of all the cases in which a court of equity relieves against breach of covenant, and laid it down that the court would not relieve, except in cases where payment of money is a complete compensation, and will put the party in the same situation as he would have been if there had been no breach. In this case there has been a wilful breach of covenant. It is strange to say that the irregularity was caused by the neglect of the landlord in not requiring to see the policies. He could not have had notice until the breach was committed, even if he had applied to see the policies; and, therefore, his not having done so does not excuse the breach. In this case the landlord could not, by any payment of money, be put into the same situation as he was entitled to be, under the covenant. My opinion, therefore, is that the order *nisi* for dissolving the injunction must be made absolute."

In the case of *Reynolds* v. *Pitt*, 19 Vesey (p. 134), Lord Chancellor Eldon reviewed the cases of *Rolfe* v. *Harris* (*supra*); *Cage* v. *Russel*, 2 Ventr. (352); *De-*

Scarlett v. *Dennett*, 9 Mod. (22); *Hack* v. *Leonard*, 9 Mod. (91); *Gunston* v. *Lord Bruce*, 1 Salk. (p. 156); *Wafer* v. *Mocatto*, 9 Mod. (p. 112); *Rose* v. *Rose*, Amb. (p. 331); *Northcote* v. *Duke*, Amb. (p. 511); *Eaton* v. *Lyon*, 3 Ves. (p. 690); *Wadman* v. *Calcraft*, 10 Ves. (p. 67); and *Sanders* v. *Pope*, 12 Ves. (p. 282).

He then said (p. 141), referring to the case of *De-Scarlett* v. *Dennett* (*supra*):

> "There is no doubt that had there not been a right of reentry for non-performance of covenants, there might upon an action of covenant be compensation in damages, which that action necessarily supposes. The court, therefore, stating that there can be no relief against a breach which can not be estimated by damages, must have meant compensation estimated by some rule as certain as that of principal and interest, and Sir Joseph Jekyll proceeds to state that very idea in distinguishing the case of non-payment of rent: 'For there the loss is certain and may be recompensed with damages;' and, being pressed with the hardship, when the plaintiff was willing to make recompense, adds that it is 'owing to his own covenant, and to a wilful voluntary breach thereof, against which this court can not relieve.'"

At page 142, referring to the case of *Wafer* v. *Mocatto* (*supra*), Lord Eldon said:

> "*Wafer* v. *Mocatto* was the case of an assignment without license; if to a beggar, I do not know what damages the landlord is to get: but, if the lessee, a beggar, assigns to a wealthy man, and it is to be put upon damage, the landlord derives an advantage from it. The court, however, refused to relieve, saying: 'this is a forfeiture, and such a forfeiture against which this court can not relieve; because it is unknown what shall be the measure of the damages.' That is known in a sense; as, if the remedy was sought in an action of covenant, the law supposes the damage

in compensation: but the court means that relieving against the forfeiture they are to have, not the casual opinion of a jury, but, as it is expressed in some cases, some certain rule to go by."

Again, Lord Eldon says (p. 143):

"Where a man has covenanted to keep premises, demised to him, insured from fire, that the lessor may not be exposed to that evil, as the tenant can not himself reimburse him, and the effect of that contract is secured by reserving a right of entry, if the tenant has wilfully and obstinately prevented that insurance, and it has so subsisted for one, two, or three years (for where is it to stop?), upon what principle is a court of equity to say that a tenant, who has so neglected to fulfil his contract, shall insist that the landlord shall keep all the terms with him, as if he had duly performed it?"

See, also,

Gregory v. *Wilson*, 9 Hare, 683.
Nokes v. *Gibbons*, 26 L. J. Ch. 433.
Job v. *Banister*, 2 K. & J. 374.

In all of these cases Lord Eldon's rulings in *Hill* v. *Barclay* were followed, although in the case of *Job* v. *Banister*, the tenant lost £5,000 for a breach of covenant which might be amply remedied by £500.

Relief has likewise been refused if a tenant assign or underlet against his covenant without consent.

Wafer v. *Mocatto*, 9 Mod. 112.
Wadman v. *Calcraft*, 10 Ves. 67.
Hill v. *Barclay*, 18 Ves. 63.
Lovat v. *Lord Ranelagh*, 3 Ves. & B. 31.
Bracebridge v. *Buckley*, 2 Pri. 200–221.

Relief has also been refused where the lessee carried on a trade prohibited by the covenant.

Macher v. *The Foundling Hospital*, 1 Ves. & B. 188.

The only confusion that exists with respect to the general doctrine was introduced by Lord Erskine, through his decision in the case of *Sanders* v. *Pope*, 12 Ves. 282. This case, together with the cases in which it is cited and commented upon, are reviewed by Mr. Platt, with great care and judgment. This review will be found in Appendix A to this brief, pages 11 to 19. It is the conclusion of Mr. Platt that since the case of *Bracebridge* v. *Buckley*, 2 Pri. 215, Lord Erskine's decision in *Sanders* v. *Pope* is overruled, and its authority destroyed.

The case of *Bracebridge* v. *Buckley*, 2 Price, 200, is an important one, in that it reviews the prior cases hereinbefore referred to. This was a bill in equity filed for relief against a lessor's right of reentry for forfeiture by breach of a covenant to lay out a sum of money on the demised premises in repairs within a given time. Relief was refused on the ground that the court had no effectual means of ascertaining or of making compensation to the covenantee. The court held it was not enough to show that no damages had been sustained by delay in the repairing, and that the premises could have been put into as good or better condition as they would have been if the covenant had been effectually performed. The court further held that an alleged mistake of the solicitor who prepared the lease in introducing the limitation of the period for performance of the covenant, although not warranted by the previous agreement or so understood at that time by the parties themselves, but denied by the answer, could not affect their decision.

In delivering the opinion of the court, Richards, Baron, said (p. 225):

> "No doubt, the contract of these parties required that £1,000 should be laid out within a year, and I wish to know how what they contracted for can now be done. If not done within the given time, the contract is not performed. The lessor can not call on this court to compel

the lessee to perform the contract; and why should the lessee call on the lessor to forego it? . . . The court, therefore, can not give a compensation, because they have no means of ascertaining precisely what the compensation should be, or the mode of making it, when ascertained (p. 226). . . . I am of opinion, therefore, that this bill should be dismissed. Lord Erskine's decision (*Sanders* v. *Pope*) did not give satisfaction in Westminster Hall."

Graham, Baron, said (p. 230):

"I agree that a court of equity will relieve, where a complete compensation can be effectually made, and the party put *in statu quo*. But I am at a loss to understand what is meant by compensation in such a case as this. . . . If we should grant relief, we should decide that all such clauses are merely *in terrorem*, though made with care, and by skilful conveyancers (p. 231). . . . I am surprised it should be thought that a series of cases support the doctrine of relieving in such a case, for I think it will be found to be only where a compensation can be made in the way of damages; but here the money should have been laid out in repairs. All the cases refer to where the party injured is to receive damages, which could not be the case here, for a recompense in damages is not required, nor would that remove the effect of the breach of covenant."

Thompson, Chief Baron, said (p. 232):

"It really comes to a question, whether in all cases of reentry on breach of covenant, a court of equity will do away the covenant? The authorities of *Wadman* v. *Calcraft* and *Hill* v. *Barclay*, do, I think, establish what is right to be done in these cases. The first was for non-payment of rent. Ejectment was brought; and an issue was directed to ascertain if there had been any breach of the covenant to repair; clearly with a view to a decision, that if there was, that would be conclusive, and no relief would be given."

In this case Wood, Baron, dissented and supported the decision in the case of *Sanders v. Pope.*

In a note to the report of *Sanders* v. *Pope* (12 Ves. 294) the reporter says: "That the authority of the principal case has been very much shaken, see ante, note 2, to *Eaton* v. *Lyon*, 3 Ves. 690. See, also, the notes to *Williams* v. *Cheney*, 3 Ves. 59; and the note to *Wadman* v. *Calcraft*, 10 Ves. 67."

In the publication entitled "Overruled Cases" by Bigelow, this case is included under the name of "*Pope* v. *Sanders*, 12 Vesey, 282–290," and is said to have been denied in the case of *Swanton* v. *Biggs*, 2 Molloy (14–16). In this last named case, counsel in argument said: "*Pope* v. *Sanders*, 12 Ves. 290, will not be followed now." Lord Chancellor Hart said:

> "Lord Erskine was clearly mistaken in *Pope* v. *Sanders*. It is settled the other way. I think the statute (11th Ann, Chap. 2) is imperative to relieve, upon the terms required by the statute being complied with. It is an act to abridge the equity of a tenant and reduce to six months the relief which the court was in the habit of extending to him at any time, upon putting the landlord in as good a situation by payment of his rent and costs. This is the doctrine of this equity, a principle which runs through the whole doctrine of the court in respect of mortgages and forfeitures for non-payment of money to the person insisting on the forfeiture. It would not apply if the eviction had proceeded upon the other ground of waste and such breaches of covenant. In such cases the court does not relieve against forfeitures; as in the case of the house in Skinner street, in which I was counsel for the tenant, who had covenanted to insure against fire and had not insured. There the court refused to relieve, *because, although no damage actually occurred, the risk had been undergone contrary to the agreement. Reynolds* v. *Pitt*, 19 Ves. (134). I confess I thought that a hard case, an instance of a sound principle carried to the extremity of rigor."

In the English work of Woodfall on The Law of Landlord and Tenant (13th edition), the author says (p. 328):

> "The result of the modern cases appears to be that accident and surprise afford the only instances in which relief was given, and that the fact that a landlord gained ever so large an improved value by insisting on the forfeiture was not taken into account."

The statute of 22 and 23 Victoria, c. 35 (now repealed and superseded by the Conveyancing Act), gave power to a court of equity to relieve, against failure to insure, in a case where no loss had happened, and the breach had been committed without fraud or gross negligence, and there was an insurance on foot at the time of the application to the court.

Ibid, p. 328.

All considerations applicable to a failure to insure apply with augmented force to a failure to pay taxes. Fire does not destroy title; a tax sale does.

The Conveyancing Act (44 and 45 Victoria, c. 41) made material changes in preexisting law. We are not concerned with the provisions of this act here, as it can have no operation upon preexisting law.

That the foregoing cases establish what this preexisting law was, has been definitely determined by this court in the case of *Sheets* v. *Selden*, 7 Wall. 416-422. Mr. Justice Swayne, delivering the unanimous opinion of the court, says (p. 421):

> "Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interest, and costs must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of equity proceeds are, that the rent is the object of

the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced, if such is the remedy provided by the contract. The rule is applied to the covenant to repair, to insure, and not to assign. Lord Eldon limited the relief to cases where the lease required the payment of a specific sum of money. The authorities going beyond this he held to be unsound, and declined to follow them. Speaking of *Wadman* v. *Calcraft*, he said that the Master of the Rolls in that case held 'that, though against ejectment for non-payment of rent the court would relieve upon a principle long acknowledged in this court, but utterly without foundation, it would not relieve where the right of the landlord accrued, not by non-payment of rent, but by the non-performance of covenants which might be compensated in damages.' Such is now the settled English rule upon the subject. In *Bracebridge* v. *Buckley*, Baron Wood, in a dissenting opinion, made an earnest and able assault upon this doctrine. The question may be regarded as yet unsettled in the jurisprudence of this country."

Prior to the passage of the Conveyancing Act the law was settled in England, that, save in cases of fraud, accident, and mistake, equity will not interfere when the measure of compensation is uncertain, and that measure is necessarily uncertain, save where the breach concerns a covenant to pay rent. A breach of a collateral covenant does not admit of a certain measure of compensation. A lessor contracts in view of the law. His contract right to have a collateral contract performed under

penalty of forfeiture is a right of property, and can not be taken from him, save by process of condemnation. It can no more be taken from him than his contract right to receive a given sum for goods sold and delivered.

Coming to American authorities, it is said by Mr. Story, in section 1314 of his work upon Equity Jurisprudence, that—

> "the right to redeem in equity in cases of this character is now well established; and the general principle now adopted is that, wherever a penalty is inserted merely to secure the performance or enjoyment of a collateral object, the latter is considered as the principal intent of the instrument, and the penalty is deemed only as accessory, and therefore as intended only to secure the due performance thereof, or the damage really incurred by the non-performance. In every such case the true test by which to ascertain whether relief can be had in equity is to consider whether compensation can be made or not. If it can not be made, then courts of equity will not interfere. . . .
>
> "The same doctrine has been applied by courts of equity to cases of leases where a forfeiture of the estate and an entry for the forfeiture is stipulated for in the lease, in case of the non-payment of the rent at the regular days of payment; for the right of entry is deemed to be intended to be a mere security for the payment of the rent."

Section 1323:

> "Indeed, the doctrine seems now to be asserted in England that in all cases of forfeiture for the breach of any covenant, other than a covenant to pay rent, no relief ought to be granted in equity, unless upon the ground of accident, mistake, fraud, or surprise, although the breach is capable of a just compensation; and the same rule is applied to cases where there is not only a clause for reentry in case of non-payment of rent, but also a proviso that if the rent is not duly paid the lease shall be void. . . .

"Section 1324. Be this as it may, it is clearly established that courts of equity will not interfere for the breach of covenants and conditions where there can not be any just compensation decreed for the breach. Thus, for example, in the case of a forfeiture for the breach of a covenant not to assign a lease without license, or to keep leasehold premises insured, or to renew a lease within a given time, no relief will be given; for they admit of no just compensation or clear estimate of damages."

Mr. Pomeroy, in his work upon Equity Jurisprudence, volume I, section 453, states the law as follows:

"Where a lease contains a condition that the lessor may reenter and put an end to the lessee's estate, or even that the lease shall be void upon the lessee's failure to pay the rent at the time specified, it is well settled that a court of equity will relieve the lessee and set aside a forfeiture incurred by his breach of the condition, whether the lessor has or has not entered and dispossessed the tenant. This rule is based upon the notion that such condition and forfeiture are intended merely as a security for the payment of money.

"Section 454: Equity will not, under ordinary circumstances, relieve against a forfeiture arising from the breach of other covenants contained in the lease, on the ground that no exact compensation can be made. Among these covenants, for a breach of which no relief can ordinarily be given, is that to repair generally, or to make specific repairs, or to lay out a certain sum of money in repairs or erections within a specified time; a covenant to insure; a covenant not to assign without license; and in other covenants of a special nature. It should be observed, however, that in all cases of this class relief may be given when the breach was the result of fraud, mistake, accident, surprise, and the like, or was acquiesced in or waived by the lessor."

An elaborate note is appended to the case of *Smith* v. *Mariner*, 68 Am. Dec. 73 (the note beginning at page 85), where the law is stated as follows:

> "Though it is stated that equity will always and only grant relief against a forfeiture where the condition broken was for the payment of money, this rule is certainly not absolutely correct, but is even said to be clearly incorrect. Where the act in default of which a forfeiture is to be incurred is such that its value can not be pecuniarily measured, so that compensation for the default can not be ascertained definitely or with any reasonable precision, relief against a forfeiture will not, under ordinary circumstances, be given. (Citing authorities.) And in many cases of forfeiture incurred on breach of covenants in lease, or stipulation in other agreements, courts will refuse relief, though compensation for the injury could be ascertained without difficulty, as for breach of covenants to keep insured, not to assign, for repairs, and the like. . . .
>
> (Page 86:) "Courts will refuse to aid a defaulting party or relieve against a forfeiture where the violation of the agreement occurred through gross negligence, or was wilful or persistent. . . .
>
> "Forfeitures for the breach of covenants not intended merely as a security for the payment of money will not generally be relieved against, for the reason that no exact compensation can be made. Among such are covenants to make general or specific repairs or improvements; covenants to insure; covenants not to assign without license. So as to other special covenants, such as a covenant for the personal services of a certain individual; a covenant to refrain from carrying on a particular trade; a covenant to cultivate lands in a husbandlike manner; a covenant not to suffer persons to use a private road over the land leased."

The question would appear to be directly decided by

this court in the case of *Sheets* v. *Selden*, 7 Wall., 416. At page 421 the court say:

> "Courts of equity are governed by the same rules in the exercise of this jurisdiction as courts of law. All arrears of rent, interests, and costs, must be paid or tendered. If there be no special reason to the contrary, an injunction thereupon goes to restrain further steps to enforce the forfeiture. The grounds upon which a court of equity proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. *In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced if such is the remedy provided by the contract. This rule is applied to the covenant to repair, to insure, and not to assign.*"

It has been explicitly decided that, where due payment of taxes is one of the covenants of a lease, and the taxes are allowed to become delinquent by the lessee or his assigns, no demand for their payment by the lessor is necessary before declaring a forfeiture, and that equity will not relieve against the forfeiture of a lease for breach of covenant when the breach has been culpable, long persisted in, and detrimental.

> *Bacon* v. *Park*, 19 Utah Reports, p. 46; decided in the year 1899.

The following language, used by Baskin, J., in that case, is very pertinent:

> "By the covenants of the lease of said premises, in case of default the lessor was authorized to re-enter without notice and forfeit the lease. It required no accounting to fix the amount of said

taxes. The plaintiff, by going to the treasurer's office, could have ascertained the amount; and if he intended to keep the covenants of the lease it was his duty to do so, and, when ascertained, to pay the amount, without applying to the defendant Park for such information. He knew that the premises had been sold for delinquent taxes, and that the time for redemption would soon expire, and that if the redemption was not made, that Hamilton Park's title to the premises would be defeated."

The following language of the court is also especially relevant, in view of the fact, admitted upon the face of the bills, that after the plaintiff knew not only that the property had been sold for taxes, which she had covenanted to pay, but that that sale had ripened into a deed and was irredeemable, she still, when possessed of such knowledge, wasted weeks in a negotiation with the holder of the tax title, endeavoring to obtain better terms from him:

"The plaintiff was aware of the covenants in the lease relating to forfeiture. He knew that default had been made in the payment of taxes for several years (the deficit for taxes amounting to about four thousand dollars), and that the premises had been sold for the non-payment of the same, and that the time to redeem had nearly expired; yet he did not intend to redeem until the last day. Such intention and such delay was a gross violation of the covenants of the lease. The evidence shows that Mr. Park (the owner of the premises) was in straitened circumstances. His property was in danger of being sacrificed for the non-payment of taxes. *By forfeiting the lease he ascertained that he could raise the money necessary to redeem the property by releasing the same. It would have been reckless on his part to let such an opportunity pass, and it was absurd for the plaintiff to expect that the lessor would not assert his right of forfeiture for the non-payment of taxes until the last day for*

INSERT.

After the brief and argument of the appellant Webb had been printed and filed, his counsel received in due course of publication the advance sheets No. 6 of Volume LXIX of the Lawyers' Reports Annotated. At page 833 will be found a note covering the whole subject of forfeiture, to which counsel respectfully refer the court. They desire to especially call the attention of the court to the case of Gordon *vs.* Richardson, 185 Mass., 492, which is directly in point. The Supreme Court of Judicature of Massachusetts, in a unanimous opinion, declined to follow the decision of the Court of Appeals of the State of New York in the case of Giles *vs.* Austin (supra). In the opinion the English cases of Peachy *vs.* Duke of Somerset (supra); Hill *vs.* Barclay (supra); Reynolds *vs.* Pitt (supra); Bracebridge *vs.* Buckley (supra), and Green *vs.* Bridges (supra), are cited and approved. The court in their opinion point out that the breach of a covenant to pay rent is a very different thing from the breach of a covenant to pay taxes. At page 493, the court say:

> "In this case the defendant entered for breach of the covenant to pay taxes, as well as for breach of the covenant to pay rent. When he exercised his right of reentry, in September, 1902, not only was the tax for 1900 not paid, but the estate of the defendant had been sold because of the plaintiff's failure to pay this tax as he had covenanted to do. The defendant's estate had been sold to pay this tax in the June preceding the September when the defendant entered on the estate. The thing here in question, secured by the right of reentry, not only has not been performed, but it can not be performed now. The tax for 1900 has been paid and no longer can be paid by the plaintiff. The tax was paid to the collector by the application thereto of the proceeds of the tax sale. *There is a right to redeem this tax title, but the tax has been paid, and the thing secured by the landlord's right of reentry can no longer be performed by the tenant. By the very terms of the covenant secured by the forfeiture, any performance of it is at an end, and that is the end of the plaintiff's application for relief from the forfeiture in the case at bar.*
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> "Moreover if it were permissible to look behind the terms of the covenant here in question

> office, could have ascertained the amount; and if he intended to keep the covenants of the lease it was his duty to do so, and, when ascertained, to pay the amount, without applying to the defendant Park for such information. He knew that the premises had been sold for delinquent taxes, and that the time for redemption would soon expire, and that if the redemption was not made, that Hamilton Park's title to the premises would be defeated."

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> "Moreover if it were permissible to look behind the terms of the covenant here in question to what might be termed its true nature and substance the plaintiff would gain nothing. *If you look beyond its terms, the real substance and nature of a covenant to pay taxes assessed on the demised premises is to protect and hold harmless the landlord's estate.* When the breach of the covenant has reached the stage where the land-

lord's estate has been sold to pay the taxes which the tenant should have paid, and through the default of the tenant a paramount outstanding title has come into existence, *we have a breach of covenant for which the plaintiff fails to show that compensation can be made. It is like the breach of a covenant to insure or repair* where equity does not ordinarily grant relief against forfeiture of the tenant's estate. Mactier *vs.* Osborn, 146 Mass., 399, 402. Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56 (*overruling Lord Erskine's opinion in Sanders* vs. *Pope, 12 Ves., 282, which never went to a decree, p. 294*). Reynolds *vs.* Pitt, 19 Ves., 134. Bracebridge *vs.* Buckley, 2 Price, 200. Green *vs.* Bridges, 4 Sim., 96.

"Lord Erskine's opinion in Sanders *vs.* Pope was in effect that the forfeiture of a leasehold estate for breach of a collateral covenant stood on the same ground at common law as that on which the forfeiture of a bond stands under St. 8 & 9 Wm. III, c. 11, sec. 8, which (as Baron Parke said in Beckham *vs.* Drake, 2 H. L. Cas., 579, 629) 'in effect makes the bond a security only for the damages really sustained.'

"But that view did not prevail. It is settled that in case of waste (Peachy *vs.* Somerset, 1 Stra., 447), in case of a breach of a covenant to make repairs (Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56; Bracebridge *vs.* Buckley, 2 Price, 200), and in case of the breach of a covenant to insure (Reynolds *vs.* Pitt, 19 Ves., 134, Green *vs.* Bridges, 4 Sim., 96), it being impossible for the tenant to show affirmatively that compensation can be made, relief ordinarily will not be given. It was this which C. Allen, J., had in mind in Lundin *vs.* Schoeffel, 167 Mass., 465, 469, when he said of the case then before the court that it 'was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, non-repair, or non-insurance."

It appears from the note already referred to (69 L. R. A., pp. 833–865) that although the mere declaration of the forfeiture will not of itself destroy the power of equity to afford relief (in cases of accident, etc.), yet that is an important step towards the assertion of the rights of the obligee, and where he has taken the necessary steps to reassert his title at law, the obligor must make a stronger case to entitle himself to relief.

The authorities in support of this principle are cited under paragraph VIII of the article referred to. In the

> *redemption of the same from the tax sale.* Equity will not relieve against a forfeiture of a lease where the breach of the covenants has been so culpable, long persisted in, and detrimental as the evidence in this case shows the breaches to have been."

In the case of *Baldwin* v. *Reese et al.*, (see opinion of court in Appendix B of this brief), decided in the Superior Court of Cincinnati in the year 1880, the direct question here concerned was presented, and the court said:

> "The defendant (tenant) is not entitled to an account of the amount of unpaid taxes to enable him to make a tender. The wrong done by omitting to pay taxes, in violation of the covenant, does not give a right to call for an account. It is his business to know. But if the amount due on account of unpaid taxes were perfectly ascertained, defendant could not relieve the forfeiture by making tender of it. Non-payment of taxes is not like non-payment of rent; *it puts in jeopardy the estate of the lessor, and equity does not relieve against such a forfeiture.*"

Certain American cases, in which relief was given by a court of equity to a defaulting lessee, will now be considered.

The case of *Sanborn* v. *Woodman*, 5 Cushing, 36, was the failure to pay a definite sum of money due as interest on an assumed mortgage. The decision was on that point alone.

The case of *Hancock, Admr.*, v. *Carlton*, 6 Gray, 39, was one of failure to pay an encumbrance assumed by a purchaser. Relief refused on the ground of *laches*.

The case of *Mactier* v. *Osborn*, 146 Mass. 399, was one in which the lessee had really, although not formally, kept his covenant to insure. The lessor had been exposed to no danger. Relief was given on the ground of accident

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The authorities in support of this principle are cited under paragraph VIII of the article referred to. In the case at bar the bill is filed by the tenant to enjoin proceedings at law by the landlord to regain possession of the demised premises after a forfeiture declared by the landlord. It will be noted in the case of Gordon *vs.* Richardson that the case of Sanders *vs.* Pope (supra), is referred to as having been overruled.

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or mistake of third persons misleading the lessee. The court say (p. 403):

> "The property has been all the time fully insured. It (failure to insure in due form) was an occurrence not anticipated by her (lessee) and not known to her until after the demandant entered to enforce a forfeiture. No misconduct or culpable fault can be attributed to her."

The case of *Lundin* v. *Schoeffel*, 167 Mass. 465, was really one of vexatious litigation. Two alleged causes of forfeiture were adjudged trifling; the third was a question of reasonable delay in making repairs to demised premises. The case was decided on these grounds. The court say, (*obiter*):

> "But the lessees' failure in this case was mainly an omission to do something promptly which was only useful to the lessors by way of security for the future payments of rent. It was not like a case where the omission *caused a present injury or increase of risk to the lessors*, as in the case of waste, non-repair, or non-insurance" (p. 469).

The case of *Giles* v. *Austin*, 62 N. Y. 486, is authority for the proposition that a covenant to pay taxes by a lessee is in the nature of a covenant to pay money. In that case payment of the taxes in default had been made before they had become irredeemable, and no rights of third persons had attached (p. 493).

The opinion does not honor with a passing glance the real question in all such cases, to wit: the danger to which the lessor has been exposed by the lessee's default, and the impossibility of compensating such danger. The case of *Garner* v. *Hannah*, 6 Duer. 262, is a decision of the Superior Court of the city of New York, cited by the Court of Appeals as authority for their decision in the case first named. There, also, was a covenant to pay

taxes and a breach by the lessee. But there, also, the court say (p. 274):

> "Relief may be granted against the breach of an agreement, not wilful or fraudulent, *when full compensation* can be made, so as to render the party fully secured and indemnified, and place him in the same situation as if the occurrence had not happened."

The case of *Noyes* v. *Anderson*, 124 N. Y. 175, follows the preceding case of *Giles* v. *Austin* (*supra*). There is a strong dissent (p. 183), in which the true nature of a covenant to pay taxes is set forth. The decision of the court turns upon the fact that the mortgagor, who had covenanted to pay certain taxes, and who did not live in the city where the taxes were assessed, left the matter of taxes in charge of her son, who did live there. He paid the taxes in 1886 and had in his hands the mortgagor's money with which to pay the assessment in question, of whose existence he did not know. It appears that he might have ascertained about it at the office of the clerk of arrears, but when he paid the taxes of 1886 at the tax office in the city, he was upon his inquiry informed by some one in the office that there was no sum due or in arrears against the property. It is clear that his purpose was to pay the taxes and assessments, and that his failure to make an earlier payment in this instance was not wilful neglect on his part, nor was the plaintiff prejudiced by it.

The case of *McClartey* v. *Gokey*, 31 Iowa, 506, turned upon the indefiniteness of the contract in question there with respect to the time when certain taxes should be paid.

The case of *South Penn Oil Co.* v. *Edgell*, 48 West Va. 348, was determined explicitly and narrowly upon the ground that a certain supply of gas provided for in a lease was "a rental consideration easily ascertainable

in money, and that so far as it was concerned the forfeiture was in the nature of a penalty to secure the gas right to the appellants, against which a court of equity will grant relief on the payment of the damages to be properly ascertained, etc."

The case of *Tibbetts* v. *Cate*, 66 N. H. 550, went upon the ground that the lessee was ignorant of business, and that her failure to pay taxes as covenanted was not wilful.

The case of *Kopper* v. *Dyer*, 59 Vt. 477, was one in which a mortgagor, without his fault or neglect, was prevented by accident from paying an instalment on the day named in a decree of foreclosure. Relief was granted because the complainant's failure to pay the covenanted sum arose from "an unforeseen and an unexpected occurrence, external to himself, of which his agency was not the proximate nor even the remote cause, and thereby he was prevented from sending his money seasonably in a form that would have been treated as payment, etc." (p. 488).

The case of *Eichenlaub et al* v. *Neil*, 3 Ohio Dec. 365, will be recurred to in connection with the subject of demand, and also upon the general subject under discussion. While it is the decision of an inferior court nevertheless it deserves careful consideration.

Of these cases, generally, it is to be said that the decisions in them do not commend themselves by any strength of judicial reasoning. Several of them rely for authority upon the overruled English case of *Sanders* v. *Pope* (*supra*). It is only in the dissenting opinion in the case of *Noyes* v. *Anderson* (*supra*), that the radical difference is pointed out between a covenant whose breach involves only a postponement in the payment of money and a covenant whose breach involves the loss of a house by fire, or of real estate by a transfer of title under violated tax laws.

As opposed to the lax utterances of these cases on the general principles of the law of forfeiture, we have the following decisions of American courts:

In the case of *Clark* v. *Barnard*, 108 U. S. 436, this court interpreted an instrument as imposing a statutory penalty and not constituting a mere security, although the case was a hard one. At page 456 Mr. Justice Matthews strikes the true note:

> "It has accordingly been uniformly held in cases too numerous for citation, that courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions where there *can not be any just compensation decreed for the breach*, for, as was said by Lord Chancellor Macclesfield in *Peachy* v. *Duke of Somerset*, 1 Strange, 447, *'it is the recompense that gives this court a handle to grant relief.'*"

In *Klein* v. *Insurance Co.*, 104 U. S. 88, this court said (p. 90) in declining to relieve a forfeiture under a life insurance policy:

> "In *Rose* v. *Rose* (Amb. 331, 332), Lord Hardwicke laid down the rule thus: 'Equity will relieve against all penalties whatsoever, against nonpayment of money at a day certain, against forfeitures of copyholds, but they are all cases where the court *can do it with safety to the other party*, for if the court can not put him in as good condition as if the agreement had been performed, the court will not relieve.'"

So in *Thompson* v. *Insurance Co.*, 104 U. S. 252, this court said in a similar case to that last cited (p. 257):

> "In the second replication the excuse set up is, that before the note fell due Thompson became sick and mentally and physically incapable of attending to business until his death, on the 3d day of November, 1874, and that the plaintiff was ignorant of the outstanding note. We have lately

held, in the case of *Klein* v. *Insurance Company*, supra, p. 88, that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows from the position that the time of payment of premium is material in this contract, as was decided in the case of *New York Life Insurance Co.* v *Statham*, 93 U. S. 24. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and if a forfeiture is provided for in case of nonpayment at the day, the courts can not grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all."

Again, the court say (p. 260):

"Courts do not favor forfeitures, but they can not avoid enforcing them when the party by whose default they are incurred can not show some good and stable ground in the conduct of the other party on which to base a reasonable excuse for the default. We think that no such ground has been shown in the present case, and that it does not come to the line of any of the previous cases referred to in which the excuse has been allowed. We do not accept the position that the payment of the annual premium is a *condition precedent* to the continuance of the policy. That is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver of the condition or a course of

> conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be enacted; but it must be a just and reasonable ground, one on which the assured has a right to rely."

At the present term, in the as yet unreported case of *The Nederland Insurance Company, Limited*, v. *Mary Meinert*, No. 11, October Term, 1905, this court reversed the United States Circuit Court of Appeals for the Seventh Circuit, and sustained a forfeiture by reason of failure to pay premiums upon a life insurance policy. The court said:

> "Forfeitures, though generally not regarded with favor by courts of equity, yet are necessary, and should be fairly enforced, in cases of life insurance. Promptness of payment is essential in such business (*Life Ins. Co.* v. *Statham*, 93 U. S. 24–30).
>
> "Where, therefore, the assured has, in truth, received notice (as provided by statute) of the time of payment of the premium, its amount, and where it can be paid, and a statement is made in the words of the statute itself as to the effect of nonpayment, a mistaken additional statement like the one made here ought not to be held a failure to comply with the terms of the statute and thus prevent a forfeiture, which the assured evidently contemplated."

The case of *Skinner* v. *Dayton*, 2 Johns. Ch. 526, was one involving the question as to whether or not certain payments under a contract were intended as penalties or forfeitures. Chancellor Kent said (p. 535):

> "It is, no doubt, a general principle of the court that equity will relieve where a penalty is forfeited if the case admits of a certain compensation; and the true foundation of the relief is that when penalties are designed only to secure money or damages really incurred, if the party obtains

> his money or damages he gets all that he expected or required. . . . In all the cases in which the court does interfere with the legal right it must appear clearly that full compensation can be made, so as to render the party perfectly secure and indemnified, and place him in the same position as if the occurrence had not happened."

In the case of *Baxter* v. *Lansing*, 7 Paige's Ch. Rep., p. 350, Chancellor Walworth said (p. 352):

> "But the decisions in the more recent English cases limit the act or interference of a court of equity in behalf of the defendant to those cases only where the act or omission by which the forfeiture incurred was the result of accident or mistake, and where compensation can be made to the adverse party, or where the penalty or forfeiture stipulated for in the lease is in the nature of a mere security for the payment of money, etc. *Hill* v. *Barclay*, 16 Ves. 402, 18 *Ibid.* 56; *Reynolds* v. *Pitt*, 19 *Ibid.* 134; *White* v. *Warner*, 2, Mer. 459; *Bracebridge* v. *Buckley*, 2 Price's Rep. 200."

The case of *Dunklee* v. *Adams, Adm.*, 20 Vermont, 415, was one involving forfeiture for the non-performance of a covenant, consisting in the rendering of certain services and attentions for the personal comfort and convenience of the party claiming the forfeiture. At page 421 the court say, referring to the earlier English cases:

> "But the soundness of the early doctrine in regard to the granting of relief against forfeitures of estates, incurred by the non-performance of collateral acts, has been more recently denied in England, and it now appears to be the established doctrine, that relief will only be granted where a breach of the condition is for the non-payment of money; and it is granted in such cases on the principle, that the allowance of interest for the

> delay forms a certain rule of compensation and is equivalent to a payment at the day. *Wadman* v. *Calcraft*, 10 Ves. 68; *Hill* v. *Barclay*, 16 *Ibid.* 403, 18 *Ibid.* 59; *Reynolds* v. *Pitt*, 19 *Ibid.* 140–141; *Bracebridge* v. *Buckley*, 2 Price's Rep. 200; *Rolfe* v. *Harris*, 2 *Ibid.* 206, Note; Eden on Inj., 46–48."

In the case of *The Ottawa Northern Plank Road Company* v. *Murray*, 15 Ill. 336, the court said (p. 339):

> "By the terms of the mortgage, the principal was to become due on the failure of the company to pay the interest promptly. It failed to pay the first instalment of interest when it fell due, and the mortgage was thereby forfeited. The proof introduced by the company did not sustain the allegation of the answer, that the complainant waived the forfeiture by afterwards accepting the interest. He refused to receive the money tendered, and thereby insisted upon the forfeiture.
>
> "The decree must be confirmed."

In the case of *Noonan* v. *Lee*, 2 Black, 499, the court say (p. 500):

> "The proofs in this case show, that before filing his bill, Lee (the mortgagee) notified Noonan (the mortgagor) that he elected to consider the entire amount of the mortgage debt as due. This entitled him to a decree for the full amount, although, according to the terms of the bond, one of the instalments was not due when the bill was filed. *Noyes* v. *Clark*, 7 Paige, 180."

The case of *Hukill* v. *Guffey*, 37 W. Va. 425, was one in which relief was sought against forfeiture of a lease for the non-performance of certain covenants therein. The court said (p. 448):

> "The one great thing to be done was the specific act of boring; its breach clearly non-compensable

with so small a sum as the commutation of money. I take the rule to be settled by a multitude of authorities that, before a court of conscience will relieve against a forfeiture of such a lease, there must be a fair and reasonable commutation as alternative for the main thing to be done, or the damages from failure to do such main thing must be measurable in money, with some reasonable degree of certainty, or there must be some special circumstances calling for relief from the forfeiture caused by the party's failure to perform the specific act which he covenanted to perform."

Upon a reargument of this case the court (pp. 463–464) reviewed the authorities hereinbefore referred to upon this point, as follows:

"One of the leading cases on the doctrine of relief in equity against penalties and forfeitures is *Peachy* v. *Duke of Somerset*, 1 Strange, 447, 2 White & T. Lead. Cas. Eq. (4th Amer. ed.) pt. 2, p. 2014. 'The true ground of relief against penalties is from the original intent of the case, where the penalty is designed only to secure money, and the court can give by way of recompense all that was expected or desired.' . . . 'From a very early period equity would at any indefinite time after a tenant had incurred forfeiture and been ejected for non-payment of rent at a particular time, under a stipulation in his lease, relieve him upon his paying to the lessor the rent, accrued interest, and costs, upon this principle: that, as the right of entry was intended merely as a security for the rent, the lessor thereby received full compensation, and was put in the same situation as if the rent had been paid to him when originally due. This principle was recognized by the legislature, which, however, remedied a palpable injustice by limiting the time within which the lessee might obtain relief by filing a bill.' See 2 White & T. Lead. Cas. Eq., *supra*, p. 2026, referring to English statutes similar to sections 16, 17, *et seq.*, of chapter 93.

"But equity will not relieve against forfeiture from the breach of covenants where compensation can not be made. *Gregory* v. *Wilson*, 9 Hare, 685m, 689. Hence equity will not in general, and in the absence of special circumstances calling for interference, give relief in cases of forfeiture growing out of breach of covenant for repairing, insuring, or doing any specific act, because in such cases it is unknown what the measure of damages shall be. *Wafer* v. *Mocatto*, 9 Mod. 112; *Reynolds* v. *Pitt*, 19 Ves. 141.

"Courts of equity will not interfere in cases of forfeiture for breach of covenants and conditions to do specific things, other than the payment of money, for they admit of no just compensation or clear estimate of damages; and it is a universal rule in equity never to enforce either a penalty or a forfeiture. See 2 Story, Eq. Jur. (13th ed.), 1319–24, and cases cited. Even 'in a case where an agreement creates a mere pecuniary obligation, so that a forfeiture incurred by its breach would ordinarily be set aside, a court of equity will refuse to aid a defaulting party, and relieve against a forfeiture, if his violation of the contract was the result of gross negligence, or was wilful and persistent. He who asks help from a court of equity must himself be free from inequitable conduct with respect to the same subject matter.' See 1 Pom. Eq. Jur., sec. 452.

"The general principles 'underlie all the cases which abound upon the subject, and have been canonized in the standard elementary works. They recommend themselves to every man's common sense of reason and justice, in view of the special objects which courts of equity have been constituted to effectuate.' Justice Sharswood in *Oil Creek Railroad Co.* v. *Atlantic, etc., R. Co.*, 57 Pa. St. 65."

In the case of *People's Bank* v. *Mitchell*, 73 N. Y. 406, the lessee had covenanted to pay all taxes and assessments, and in case of failure the lessor was entitled

to reenter. In case the lessee built permanent buildings on the demised premises during the term and performed all the covenants on his part, it was covenanted that the lessor should either extend the term or pay the lessee the value of the buildings, etc. The lessee erected a building on the premises. The lease expired May 1, 1867. The lessee failed to pay taxes for the year 1866. The lessor learned for the first time after the expiration of the lease that the lessee had not paid the taxes; he declined to give a new lease, took possession at the end of the term, and refused to pay for the building. The lessee thereupon sued for the value of the building. The court held that the action was not maintainable; that the payment of the taxes was a condition precedent, the performance of which, in the absence of evidence showing a valid excuse for non-performance, was essential to fix the liability of the lessor. The court further held (p. 415) that there was no ground in the complaint in evidence upon which a court of equity should interfere to relieve the lessee from the consequence of his failure to perform. Upon this point the court said (p. 414):

> "The counsel for the plaintiff seeks to avoid the effect of the default in the payment of the taxes, upon the ground that there was only a technical forfeiture, which a court of equity will relieve. Equity will relieve against a breach of covenant for the payment of money, where the covenant is in the nature of a penalty or forfeiture, and designed merely as a security to enforce the principal obligation, and in such case only where, by the payment of money, the parties can be put in the same position as if there had been no default. . . . So, also, in case of mistake, accident, fraud, or surprise, relief was obtained in equity; but the rules stated, which were sometimes invoked to prevent injustice, have no application where, as in the case at bar, the mode of determining the rights of the lessor, or his assigns, to a new lease or to payment for his building was

> expressly provided for and dependent upon the performance of conditions precedent which have not been performed. There is no ground upon which a court of equity should intervene to relieve the lessee from the consequence of a failure or neglect to perform."

In the case of *Parsons* v. *Smilie*, 97 Cal. 647, the court held that failure to maintain a lumber yard for the prescribed time upon premises that had been sold was a violation of a condition subsequent, which would justify the grantor in reentering and avoiding the conveyance. The court, in its opinion, reviewed the English authorities hereinbefore cited, and said (p. 653):

> "So there are numerous cases arising under leases, and in contracts where time is not of the essence of the contract, in which courts of equity will relieve against a forfeiture. The general doctrine is, that equity will relieve where the thing may be done afterwards, or compensation can be made for it, but that unless a full compensation can be given, so as to put the party in precisely the same situation, a court of equity will not interfere; for such jurisdiction would be arbitrary. Washburn (Real Property, vol. 2, p. 23) says: 'And the only cases where equity interposes as to such conditions are where the failure of performance has been the effect of accident, and the injury is capable of compensation in damages which the court has the means of measuring, and where the grantor can be made perfectly secure and indemnified, and can be placed in the same situation as if the occurrence had not happened. This applies to cases where the condition is for the payment of money at a particular time, and compensation for the delay can be measured by the interest during that time. But where the condition is for the performance of a collateral act, the rule is different, as the court has no standard by which to measure damages.' (*Livingston* v. *Tompkins*, 4 Johns. Ch. 415, 431; *Bacon* v. *Huntington*, 14

> Conn. 92; *Hill* v. *Barclay*, 18 Ves. 56; *Henry* v. *Tupper*, 29 Vt. 358, 372.) The same author again says (p. 23): 'But if the act be wilfully done, or one for which the court has no certain rule by which to measure the damages, beyond their own arbitrary judgment in the matter, equity will not relieve.' (See, also, *Descarleti* v. *Dennett*, 9 Mod. 22; *Wafer* v. *Mocatto*, 9 Mod. 112; *Northcote* v. *Duke*, 2 Eden 322.) In *Elliott* v. *Turner*, 13 Sim. 485, it is held that 'wilful,' in such a case, is the same as a voluntary act of the party."

See, also, case of—

> *South Carolina Co.* v. *Augusta Co.*, 111 Ga. 420, 425.

We may claim thus far to have established the proposition that a court of equity will not relieve a tenant from a forfeiture incurred by breach of a covenant to pay taxes, in consequence of which breach a third party has acquired a deed to the demised premises, unless the breach was the result of fraud, accident, mistake, or surprise.

Whether such a breach has been established by the testimony, as also whether the landlord has waived any breach or has estopped herself from asserting it, we shall consider later. The discussion of this first question is relevant to the first, second, third, and fourth assignments of error. Let us pass on now to the next question.

QUESTION II.

Is Such Breach One that Can be Compensated to a Landlord?

While this topic has already been considered, nevertheless its importance requires a more detailed study.

The opinion of the Court of Appeals of the District of Columbia upon the interlocutory appeal deals summarily with the question. The covenant to pay taxes is viewed

as merely a covenant to pay money (21 App. D. C. p. 151). When it is urged that a breach may mean loss of the property, the answer is that the lessor must be vigilant to see that the lessee does not commit a breach (*Ibid*, p. 152). These utterances, judicial though they are, would seem to be destructive of elemental contract rights.

Upon the declaration of the Court of Appeals the covenant to repair and the covenant to insure are equally mere covenants to pay money. They constitute a part of the rent just as much as the covenant to pay taxes.

If we turn to the reasoned opinions of courts to learn what the general nature and effect of the covenant to pay taxes are, we find clear and authoritative statements on the subject.

Directly in point is the case of *Hand* v. *Suravitz*, 148 Penna. St. 202. This was a case in which a lease of certain demised premises provided that the lessee should pay his own gas and water bills; it further provided that if the lessee should fail so to do, the lessor might declare the lease forfeited. Chief Justice Paxson delivered the unanimous opinion of the court, and at page 207 said:

> "The defendant entered into the occupation of the demised premises, and remained in possession for about seventeen months, and during that time paid no water rents. The plaintiff, by virtue of the power contained in the lease, caused a judgment to be entered in ejectment against the defendant for the premises, and a writ of *habere facias possessionem* to be issued. Upon the application of the defendant, the court below stayed the writ, and granted a rule to show cause why the judgment should not be opened and defendant let into a defense. It is not denied that he had notice to pay the water rent, and that he did not pay it. The court below held that the stipulation in the lease, that the 'lessee shall pay his own gas and water bills,' did not admit of the construction that a failure to keep and perform it

would work a forfeiture of the lease, and made the rule to open absolute, and ordered the judgment to be vacated.

"We do not regard the clause in reference to the water rents as a mere declaration as to who is to pay for the gas and water furnished on the premises. Nor do we think there is any ambiguity as to who the water rents are to be paid to. The water rents are payable, as every intelligent man knows, to the water company furnishing the water. When, therefore, a tenant covenants in his lease to pay the gas bills or the water rents, it is as much a condition of his holding as any other covenant therein. If they are not paid, and the tenant vacates the premises, the landlord is obliged to pay them, or have the gas and water cut off from his premises. The latter has a right to protect himself against this and to enforce a lawful covenant for that purpose in the lease. It was held in *Fernwood Masonic Hall Association* v. *Jones*, 102 Pa. 307, that where, in a lease, the lessee covenants to pay the lessor for all gas consumed on the premises, a sum due for gas consumed is to be regarded as rent in arrear, and may be distrained for. While forfeitures are not favored in the law, I apprehend no one will dispute the right of a landlord to forfeit for non-payment of rent, where apt words of forfeiture are embodied in the lease. The right is equally clear to forfeit for non-payment of water rents where that is the agreement of the parties. In the case in hand the defendant distinctly agreed that his lease might be forfeited for such non-payment. He could have avoided it by paying the bills.

"The order of the court below, opening and vacating the judgment, is reversed and set aside, and the judgment is reinstated."

In the case of *Rector, etc., of Trinity Church* v. *Higgins*, 48 N. Y. 532, the question was concerning the effect of a covenant in a lease whereby the defendant covenanted to bear, pay, and discharge all such duties,

taxes, assessments, and payments, of what nature or kind soever, as should, during the term aforesaid, be imposed on, or grow due or payable out of, or for, or by reason of the said demised premises, or any part or parcel thereof. It appeared that two assessments, amounting to $4,875, had been imposed by the city authorities, but that they had not taken any proceedings to enforce the collection thereof, although the defendant had not paid them. The court held (p. 535):

> "The covenant of the defendant is affirmative and positive, not collateral or secondary, in its terms. He covenants to 'bear, pay, and discharge all taxes and assessments,' etc., as an obligation or debt of his own, and the language conveys no idea that the plaintiffs are first to bear and pay, before the demand becomes obligatory upon the defendant for payment.
>
> "The covenant is broken when the defendant neglects to pay taxes or assessments duly imposed. The defendant is not at liberty to say that it is the debt of the plaintiffs; let them first pay it, and I will pay them. It is his own debt, made so by the terms of his covenant.
>
> "The distinction between a covenant or promise whereby the defendant makes the amount to be paid his own debt, and one simply of indemnity whereby the covenant or promise is not broken until the amount has been paid by the plaintiff, pervades all the cases upon this subject, from the case of *Jackson* v. *Port* (17 J. R. 479), when the rule became somewhat settled and defined, until that of *Gilbert* v. *Wiman* (1 N. Y. R. 550)."

The court further held (p. 537):

> "The rule may be definitely drawn from numerous cases, that where indemnity only is expressed, damages must be sustained before a recovery can be had; but a positive agreement to do an act which is to prevent damage to the plaintiff will sustain an action where the defendant neglects or refuses to do such act. (Numerous

cases cited). . . . (P. 538.) Parties have the just right to make all lawful contracts guarding their rights and securing the performance of their intentions, including that of contravening the rule of actual compensation for actual loss; and whe expressed in apt and suitable language, it would be flagrant wrong if courts of justice should assume t disregard it, in favor of some technical rule framed for other and wholly different circumstances. I think it a sound and wholesome rule to construe a lawful contract according to its plainly expressed meaning, being governed also by the rules of construction which have been established by precedents.

"It is urged by the counsel for the defendant that the covenant should be construed to be for indemnity merely, because neither the particular tax or assessment, nor the time of payment, nor the person or corporation to whom payable, are stated in the covenant of the defendant. The covenant appears to be specific and certain without these particulars. That is certain which is capable of being rendered certain. The covenant is to pay all such taxes and assessments as shall be imposed during the term mentioned in the lease. Before the action was brought, the assessments for certain sums had been imposed. Several years had elapsed, and the defendant had neglected to pay them, according to his covenant. I am unable to perceive that the objection referred to has been well taken . . . (p. 539). It was doubtless to guard against the contingency of a sale of the premises by the city corporation, to obtain payment of the sums assessed, that the covenant was inserted in the lease. *The sale of the premises would involve a loss of the security for the rent reserved, and probably of the reversion.*"

In the case of *Noyes* v. *Anderson*, 124 N. Y. 175, Parker, J., and Follett, C. J., dissenting, say (p. 183):

"A stipulation that a debt, the payment of which is secured by a mortgage on real estate,

> shall become due and the security foreclosable, upon the failure of the mortgagor to pay interest as it falls due, or the taxes assessed on the mortgaged premises, is neither a penalty nor a forfeiture, and a court, in the absence of fraud on the part of the mortgagee, can not relieve the mortgagor from the consequences of his neglect to pay according to the terms of his contract (Jones on Mortgages, sections 77, 1180, 1181, 1182; Withers on Mort. For., sections 43, 44, 45, 46, 47; Thomas on Mortgages, section 228, and the cases cited in the sections of the text books referred to). . . . From the failure to pay taxes or assessments the court can no more relieve a party than from the failure to pay interest, which it can not do in the absence of fault on the part of the mortgagee (*Hale* v. *Gouverneur*, 4 Edw.Ch. 207; *Spring* v. *Fich*, 21 N. J. Eq. 175, 178; *Ferris* v. *Ferris*, 28 Barb. 29; *Bennett* v. *Stevenson*, 53 N. Y. (508). It is not asserted here that the mortgagee was in fault. The defendant merely attempts to excuse her neglect. A similar attempt was made in *Ferris* v. *Ferris* (*supra*), but without avail."

No damages could compensate for a breach of this covenant resulting in a valid sale and conveyance of of the demised premises to a purchaser at a tax sale.

> "The common law treats as universal a proposition which is for the most part, but not universally true, namely, that money is a measure of every loss. The defect of justice which arose from this universality of the common law principle was met and remedied in certain cases by the jurisdiction of courts of equity to compel specific performance."
>
> Fry on the Specific Performance of Contracts, Sec. 41.

We respectfully submit that it can not be said with any show of reason or authority that a covenant to insure or a covenant to pay taxes can be considered as a

mere pecuniary contract and as constituting a part of the covenant to pay a mere sum of money as rent. The right of the landlord to make this covenant is as much a right of property as any other right that he has. It can not lawfully be taken from him save by process of eminent domain, judicial execution, or some other competent legal proceeding. As was said by Lord Eldon in *Hill* v. *Barclay*, 18 Ves. 63:

> "It is sufficient that the lessor insists upon his covenant; *and no one has a right to put him in a different situation.*"

In the same case (p. 62) Lord Eldon said in answer to a suggestion that the lessor was no worse off by reason of the breach of a covenant to repair if the repairs were in fact made before the close of the term: "*The court is surely not authorized so to deal with contracts.*"

In the case of *Rolfe* v. *Harris* (*supra*) Vice-Chancellor Plumer said:

> "Why in such cases as these, of relief against breach of contract, is a court of equity to be called on to make a new contract? The parties agree that if a condition be broken the lessor shall reenter; and the court is asked to give damages instead. What damages can the court give? And what damages would reconcile a man to a tenant who breaks his contract, and brings his landlord before a court of equity by a bill to be relieved against the effect of his own injurious neglect and to defeat the landlord's remedy for the breach of the condition on which he holds, because he has done so? . . . In this very sort of case, too, how can we, when a risk has been run, estimate the *quantum* of that risk in damages? This is such a breach of covenant as is out of the measurement of damages; and the effect of giving the relief prayed would be that any tenant may hereafter break this special covenant with impunity, and every landlord must be content to take his tenant for his insurer for want of power to enforce his covenant."

In the case of *Green* v. *Bridges* (*supra*), Vice-Chancellor Shadwell said with respect to a breach of covenant to insure:

> "In this case the landlord could not, by any payment of money, be put into the same situation as he was entitled to be under the covenant."

In the case of *Reynolds* v. *Pitt* (*supra*), Lord Eldon said:

> "Where a man has covenanted to keep premises demised to him insured from fire, that the lessor may not be exposed to that evil, as a tenant can not himself reimburse him, and the effect of that contract is secured by reserving a right of entry if the tenant has wilfully and obstinately prevented that insurance and it has so subsisted for one, two, or three years (for where is it to stop?), upon what principle is a court of equity to say that a tenant who has so neglected to fulfil his contract shall insist that the landlord shall keep all the terms with him as if he had duly performed it?"

In the case of *Bracebridge* v. *Buckley* (*supra*), Richards, Baron, said:

> "No doubt, the contract of these parties required that 1,000 pounds should be laid out within a year, and I wish to know how what they contracted for can now be done. If not done within the given time the contract is not performed. The lessor can not call on this court to compel the lessee to perform the contract; and why should the lessee call on the lessor to forego it?"

In the same case Graham, Baron, said:

> "I agree that a court of equity will relieve where a complete compensation can be effectually made and the party put *in statu quo*. But I am

> at a loss to understand what is meant by compensation in such a case as this." (This case was one of repairs only.)

Thompson, Chief Baron, said in the same case:

> "It really comes to a question whether in all cases of reentry on breach of covenant, a court of equity will do away the covenant."

The suggestion is made that the tax sale and deed may be redeemed or are invalid. But is this a compensation? I have a servant whom I have hired for twelve months; he steals from me during the first month; must I keep him if he repays me the stolen money, or may I protect myself by his discharge?

Have I a legal right to let my ground to a tenant who agrees to take the trouble of insurance and taxpaying off my hands? If I find that he has not insured, must I keep him, at my risk, for the whole term because he offers to pay the insurance for my burned house? Must I again trust to his covenant to insure, or must I disregard his covenant, and myself insure, or must I watch and persuade him to keep his covenant? Why should I lose the benefit of my contract through no fault of mine? Why should I be compelled to keep an unreliable tenant, who has already exposed me to great risk and possible loss, because he promises to be more careful in the future? I may discharge my dishonest servant without payment of his wages not yet due. Why must I keep my unreliable tenant, who has allowed a third party to acquire title to my property? It is true that this tax-deed may be invalid, but the next one may be valid.

"*Misera est servitus ubi jus est vagum.*" If this sentimental stuff be law, let us cease advising our clients where women or forfeitures are concerned.

The question, which ought to be a distinct legal question, comes back: What compensation can my tenant

make to me, when he has allowed my property to be sold and conveyed for defaulted taxes, for such act of his, *if I am forced to keep him for the balance of the term?*

Who can estimate the compensation for the danger I have been in?

Who can estimate the danger I shall continue to be in for the balance of the term?

It is submitted that this question must be answered in the negative.

The discussion of this second question is also relevant to the first, second, third, and fourth assignments of error.

QUESTION III.

Must the Landlord in Such Case Make any Demand upon the Tenant Before Declaring a Forfeiture, and, if so, for What?

Before discussing authorities, it may be well to consider the circumstances of the particular case. If there had been a mere default made by the tenant, and if a demand upon her would have enabled her to redeem, then the discussion of this question of law would be pertinent. It is true that it is said (see averments of original bill, Rec. pp. 5 and 6), that in the particular case such a demand would have resulted in the tenant's at once purchasing from Wiltsie, the holder of the tax title, the tax certificate in question. Whether she would have done so or not we can not know. Whether Wiltsie would have continued his willingness to sell we can not know. But, of course, the facts of this particular case in these regards can not constitute a rule of law. We are dealing with a case in which there has not only been a tax sale, but the same has become irredeemable. Therefore, the ability to redeem would depend entirely upon the will of the adverse holder. A demand upon the lessee by the

lessor that she, the lessee, should redeem, would be a demand which the lessee might or might not be able to comply with. But no rule of law is based upon such an uncertain foundation. Indeed, it is not pretended that any such rule exists; and it is thought that no authority can be found for it.

Assuming for the argument that it was necessary that the lessor should make a demand upon the lessee, that demand must necessarily have been for the performance of her covenant. The covenant in question was not for the redemption of property from a tax sale become irredeemable, but for the payment of—

> "in each and every year thereof the taxes, general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government" (Rec. p. 14).

But the lessor could have made no such demand until she knew that there had been a breach of this covenant; and when she acquired this knowledge there could be no payment of the taxes involved, inasmuch as the default of which their non-payment was the occasion no longer admitted of removal by their payment.

Where a demand would be useless, it is not necessary.

Heard v. *Lodge*, 20 Pick. 53.
Wilstach v. *Hawkins*, 14 Ind. 541.

The only purpose of the demand would have been to give the tenant notice, but she had notice from the preceding July, and, according to the averment of her own bill, spent two months in disputing with Wiltsie whether she should pay $25, more or less, for redeeming the tax title in question (Rec. pp. 3, 4).

It is submitted, however, that the great preponderance of authority is to the effect that, even in the silence of

the lease upon the subject, notice and demand are not necessary.

The only reason why at common law demand for rent was required was a feudal one, and was based upon the extraordinary right of distress.

See *Davis* v. *Burrell et al.*, 10 C. B. 822; S. C. 70 Eng. Common Law Rep. 825, where it is said by Creswell, J.: "A demand is only necessary to justify a distress."

The English authorities are explicit upon this subject.

In 2 Platt on Leases, p. 333, the discussion of the subject is limited to demands for rent.

In the case of *Bracebridge* v. *Buckley* (*supra*), Thompson, C. B., and Graham, B, said that when a lessee, as in *Hill* v. *Barclay* (*supra*), had covenanted to make the necessary repairs within a certain time, no demand was necessary, and that a neglect of performance was tantamount to a refusal at law.

In the case of *Rolfe* v. *Harris* (*supra*), Sir Thomas Plumer said that no notice was necessary on a covenant to insure.

Sir T. Shadwick declared himself to the same effect in the case of *Green* v. *Bridges* (*supra*).

The following cases all hold explicitly that no demand is necessary:

Davis v. *Burrell et al.*, 10 C. B. 822 (*supra*).
Baldwin v. *Rees* (Ohio), 8 Am. Rec. 556 (see Appendix B).
Bacon v. *Park*, 19 Utah, 246.
Byrane v. *Rogers*, 8 Minn. 247.
Garner v. *Hannah*, 6 Duer, 262.

It is unnecessary to consider at length the absolute difference between default in payment of rent and in payment of taxes.

The lessor demands payment of rent because it is due to him. The taxes are not due to the lessor, but to the

taxing authority—a third party. Any demand by the lessor in this connection would necessarily be not for something to be done between the lessor and the lessee. It would simply be a demand that the lessee keep his covenant by paying taxes to a third party, no definite date, place, or amount of payment being named.

Of the cases cited by the appellee below in this connection, those of *Connor* v. *Bradley*, 1 How. 217; *Prout* v. *Roby*, 15 Wall. 471; *Allen* v. *Dent*, 72 Tenn. 676, 680; *McQuesten* v. *Morgan*, 34 N. H. 400, and *Bowman* v. *Foot*, 29 Conn. 331–341, are not cases involving default in payment of taxes, but default in payment of rent, and hence are entirely inapplicable.

In the case of *Jackson* v. *Harrison*, 17 Johnson, 66, decided in 1819, there is no citation of authority or discussion of principle; the court simply says, after holding that a demand is necessary for payment of rent before forfeiture:

> "The plaintiff equally fails in showing a right of reentry by reason of the fact that the defendant did not pay the United States tax, because the indispensably necessary step of making a demand of the defendant within the period required by law in order to create a forfeiture was not taken."

The facts of the case show that there was a default in paying some United States tax. The court here plainly confuses cases of default in payment of rent and in payment of taxes. It will appear from the argument of Drake, of counsel (p. 69), that this confusion pervaded the case. Counsel say:

> "There can be no pretense of maintaining this action under the statute. If it can be supported at all it must be at common law, and all the nicieties required in proceedings by the lessor must be observed. There must be a demand of the precise

> rent due on the precise day it was due, and payable at a convenient time before sunset upon the land and at the dwelling house, if there be any."

The facts show that the landlord himself paid the tax in order to prevent a tax sale.

This case was expressly disapproved in the year 1857 in the case of *Garner* v. *Hannah*, 6 Duer, 262. The point was elaborately considered by the court at pages 271–272, and the following language was used:

> "Where a forfeiture was claimed for the non-payment of rent, a demand of the rent must be shown unless the proceeding is under the statute; but taxes, as has been shown, form no part of the rent, they are not payable to the landlord nor on a day certain, and no demand could properly be made by the landlord of his tenant in respect thereto except to repay what the landlord had been compelled himself to pay by reason of his tenant's default; this would be a demand for reimbursement merely, whereas the default which works the forfeiture is the non-payment of taxes to the Government, and it is not perceived how a mere refusal to repay the amount expended by the landlord for taxes could work a forfeiture when no covenant of repayment is contained in the lease; if so, a demand of repayment can not be a necessary prerequisite to the right of action.
>
> "Besides, the payment of the taxes by the landlord, in case of the tenant's default, is not necessary to his right of action; that is complete on the breach of the tenant's covenant; a demand of their repayment by the tenant must therefore be unnecessary."

The case of *Jackson* v. *Harrison* is also disapproved in *Byrane* v. *Rogers*, 8 Minn. 247; the language of Flandrau, J., at page 251, is even stronger than that of the court in *Garner* v. *Hannah*, just cited.

In the case of *Kansas City Elevator Company* v.

Union Pacific Railroad Company, 3 McCreary, 463, the opinion was oral and was apparently a hasty one; Miller, J., said (p. 471), "I shall not be able today to deliver any but a very brief opinion." No argument of counsel on this point is reported, and no authorities are cited by the court. All that the court said upon the subject of taxes was :

> "In regard to taxes, the law is well settled, I think, that a demand for the payment thereof is necessary as a condition precedent to the right of entry."

In that case the elevator company leased of the railroad company a small parcel of land, and erected thereon elevator buildings and machinery. These had always been assessed as the personal property of the elevator company, and the taxes paid regularly. The leased ground had never been listed for taxation by the local assessors, but all the property of the railroad company in the county had been valued as an entirety for taxation by the State board, and no specific assessment of the ground leased to the elevator company had ever been made, nor had the latter ever paid any taxes on the ground or ever been requested so to do by the railroad. The demand in such case would practically be one for apportionment of taxes. The statement of the case does not show that any taxes were due; and the whole proceeding was an attempt on the part of the railroad company to summarily oust the elevator company from the leased premises, apparently without a pretense of right.

The only other case cited by the appellee was that of *Meni* v. *Rathbone*, 21 Ind. 454. It appears from the statement of facts in the opinion of the court (p. 460) as follows:

By the terms of the lease, the lessee agreed to pay all taxes of any kind; at a certain date the sum of $100 was

assessed as taxes against this property; neither the lessee nor any other person for her paid said taxes, and thereupon the property was sold to third persons, who received a certificate of purchase from the treasurer of the city. It does not at all appear that the certificate was irredeemable, and that the purchaser had acquired the right to receive a tax deed. The court say (p. 461):

> "It is conceded in appellant's brief that, as to the rent, the replies are (neither of them) specific enough in the averments as to time and place of demand thereof. But it is zealously contended that in regard to the taxes and assessments the replies are good; and quite a lengthy argument is presented to controvert the doctrine and conclusion of the courts in the cases of *Jackson* v. *Harrison*, 17 Johns. Rep. 63; *Bowman* v. *Foote*, Amer. Law Reg., April, 1862, p. 352; *Merrifield* v. *Cobleigh*, 4 Cush. 178."

It is sufficient to say here that the case of *Jackson* v. *Harrison* is the same one which has been under consideration, *supra*. The case of *Bowman* v. *Foote* is one that concerns solely the non-payment of rent; and the case of *Merrifield* v. *Cobleigh* is one which deals with neither, and is entirely irrelevant. So that the only authority upon which this Indiana case rests is that of *Jackson* v. *Harrison*. The court proceed (p. 462):

> "The right of a landlord to reenter, for breach of a condition subsequent, is not viewed with favor in the law; and where he claims that a forfeiture has occurred, and his right attacked, it devolves upon him to show that he has done everything that was required upon his part to perfect such right of reentry, rather than resort to an action for damages for a breach of such covenants. It is urged, that by the clause of the lease quoted the right of Wise to reenter, upon the failure of the lessee to pay taxes, is secured; and that without any previous act upon his part;

that, therefore, there was no affirmative act, precedent to this act of reentry, necessary upon the part of said Wise—such as demand that the taxes should be paid, or notice that he would reenter, if they were not so paid.

"In the form and order in which the reply set up the failure to pay the taxes, and the sale of the premises therefor, it would appear that the request made by Wise of Mary App, to pay said taxes, was made on the same day, but subsequent to said sale. If such a demand or request was necessary, it was not made of the right person. We are of opinion that such a request was necessary."

This Indiana case is not reasoned and cites no other authority than the New York decision of 1819.

It was insisted by the appellee in argument that the case above cited by the appellant of *Baldwin* v. *Rees*, was overruled by the subsequent case decided by the Circuit Court of Franklin County, Ohio, in 1895, of *Eichenlaub et al.* v. *Neil*, 3 Ohio Dec. 365. The court in this case, after reviewing a large number of decisions, say:

"A demand being necessary to forfeiture for non-payment of rent, we think it should be also for non-payment of taxes; but we are not satisfied that such is the law. The cases above referred to do not seem to be well considered (referring to most of the cases cited by the appellee on this point, and just by us considered). The statements are in the nature of *dicta*. No authorities are cited, and they can not be held to settle the question; nor do we think it necessary to pass upon it. The plaintiffs file their petition asking to be relieved from the forfeiture; and the matter we are to determine is whether they have made up a case entitling them to relief."

In this case there was no provision for reentry in case of the non-payment of taxes, but merely to indemnify

and save harmless the landlord against any loss, cost, damage, or expense sustained by the omission to punctually pay taxes, charges, duties, and assessments.

It also appeared from the facts of this case that the lessee or his assignee had made very valuable improvements upon the leased premises.

Bearing in mind the strictly feudal reason that existed for the doctrine of demand and notice at a certain place and hour, and of a certain person with respect to rent, it will be apparent that this reason has no application to a demand for the performance of a covenant to pay taxes or an insurance premium, or a thing of a similar nature. This is made very apparent by the reasoning of the New York court in the case cited of *Garner* v. *Hannah*, supra. The whole fabric rests upon the mistake of the New York court, in 1819, in the ill-considered case of *Jackson* v. *Harrison*, supra. As has been seen above, it would seem unreasonable to apply this rule to the case at bar, where the taxes have already been paid by Wiltsie, and the District of Columbia has no further claim against any one by reason of said taxes.

The discussion of this question is also relevant to the first, second, third, and fourth assignments of error.

QUESTION IV.

Where the Tenant Has Covenanted to Pay All Accruing Taxes Upon the Demised Premises, What, if Any, Duty Rests Upon the Landlord, as Between the Tenant and Himself, to Keep Watch Upon the Tenant's Possible Defaults and to Avoid Their Consequences?

As has been seen in the discussion of the question immediately preceding, a tenant who agrees to pay taxes thereby makes these taxes a personal debt of his own as between himself and his landlord.

> "The covenant of the defendant is affirmative and positive, not collateral or secondary in its terms. He covenants to '*bear, pay, and discharge all taxes and assessments,*' etc., as an obligation or debt of his own, and the language conveys no idea that the plaintiffs are first to bear and pay, before the demand becomes obligatory upon the defendants for payment. The covenant is broken when the defendant neglects to pay taxes or assessments duly imposed. The defendant is not at liberty to say that it is the debt of the plaintiffs; let them first pay it, and I will then pay them. It is his own debt, made so by the terms of his covenant."
>
> *Rector, etc.*, v. *Higgins* (*supra*).
> *Hand* v. *Suravitz*, 148 Pa. St. 207 (*supra*).

There can be no question that the covenant in this case is to pay the penalties as they become due. The language of the lease is—

> "pay or cause to be paid in each and every year thereof the taxes, general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government" (Rec. p. 14).

When taxes become due is a point which has been well settled. In the case of *McFarlane* v. *Williams*, 107 Ill., p. 42, it is said that—

> "The taxes were to be paid when due; and this is fixed by law. They must be paid so as to avoid a sale of the property for their non-payment, or the enforcement of any personal liability against the lessor on account thereof."

In *Ricou* v. *Hart*, 47 La. Ann., p. 1373, it is said:

> "The taxes assumed as part of the consideration of the lease were due in September. On the 31st day of December the tax debtor who has not

> paid his taxes becomes a delinquent. The law provides 'from the day the tax-roll is filed in the Mortgage Office it shall be a lien on the property.' There was a penalty due from the 31st day of December. Without notice or demand, the taxpayer is in default from that date. He owes a penalty; and the taxes are secured by mortgage on his property. He places himself completely *in mora* by not paying the tax."

To the same effect are *Rector of Trinity Church* v. *Higgins*, 48 N. Y., page 532, and *Allen* v. *Dent*, 72 Tenn., page 680, from which case we quote the following language of the court (page 680):

> "The true construction of the contract is that such taxes shall be paid in the ordinary course of collection, and shall not become in any way a burden on the lessor."

Such being the case, on what principle of law is it to be said that it is the duty of the landlord in such case to anticipate the tenant's default, or to supervise him in the discharge of his covenanted duty, or to remedy his breach of covenant by positive action upon the lessor's own part and at his own expense? Unless there is some special bond existing between the parties, counsel know of no rule or principle of law which makes one a guardian of the other. The landlord is not trustee for the tenant; nor is he his guarantor; nor is there any relation either of nature or of contract existing between them which exempts either from the ordinary legal rules applying between man and man. A person injured by another's breach of contract must do no act to increase his damage. On the contrary, he must do every reasonable act to keep down his damage. And so also with a person injured by the tort of another. But apart from this principle, which can have no application here, is there any rule known to the law which imposes a duty upon

one man in connection with the breach of covenant of another, save where the doctrine of estoppel is involved?

The discussion of this question concerns the sixth assignment of error.

QUESTION V.

Do the Acts of the Landlord in Herself Paying These Taxes (She Collecting Them From the Tenant) Down to a Certain Date, Relieve the Tenant From Her Covenant to Pay Taxes Subsequently Accruing?

While the circumstance was not averred in the bills filed in this cause, it yet appeared from the evidence (Rec. pp. 119–125, 276–279), that, during the lifetime of the original lessee, the lessor herself paid those taxes and collected them from the lessee, H. King, Jr.

While undoubtedly this would have estopped the lessor from insisting upon this covenant to the prejudice of the lessee while she continued this line of conduct, nevertheless it can hardly be contended that the covenant itself was thereby destroyed, so that it could not have been revived by notice to the lessee of an intended change of conduct on the part of the lessor. Certainly it would bind the assignee of the lessee unless she bought with knowledge of the course of conduct of the lessor in this regard, and equally certainly it could be revived against the lessee by notice.

An instructive case in this connection is that of *Thompson* v. *Insurance Co.*, 104 U. S., p. 252. In that case relief was sought from the failure to pay an annual premium upon a life insurance policy. It was admitted that the premium had not been paid, but it was contended that payment had been waived by the taking of a note in payment of the premium. It was said that the

mere taking of the note was the waiver of the conditional forfeiture. The court, however, said (p. 257):

> "But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that whilst the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity."

The additional excuse was set up that before the note fell due the insured became sick, and mentally and physically incapable of attending to business, until his death on the 3d day of November, 1874, and that the plaintiff was ignorant of the outstanding note. The court further said (p. 257):

> "In the second replication the excuse set up is, that before the note fell due Thompson became sick and mentally and physically incapable of attending to business until his death on the 3d day of November, 1874, and that the plaintiff was ignorant of the outstanding note. We have lately held, in the case of *Klein* v. *Insurance Company*, *supra*, p. 88, that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows, from the position, that the time of payment of premium is material in this contract, as was decided in the case of *New York Life Insurance Co.* v. *Statham*, 93 U. S. 24. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent

years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and, if a forfeiture is provided for in case of non-payment at the day, the courts can not grant relief against it. The insurer may waive it, or may, by his conduct, lose his right to enforce it; but that is all."

The third excuse set up, and the one which is especially relevant in this connection, is an alleged usage. In this connection the court say (p. 258):

"The third replication sets up a usage, on the part of the insurance company, of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due. *Insurance Company* v. *Eggleston*, 96 U. S. 572, is cited in support of this replication. But, in that case, the customary notice relied on was a notice designating the agent to whom payment was to be made, without which the assured could not make it, though he had the money ready. As soon as he ascertained the proper agent he tendered payment in due form. It is obvious that the present case is very different from that. The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured to pay at the day is the same, whether notice be given or not. Banks often give notice to their customers of the approaching maturity of their promissory notes or bills of exchange, but they are not obliged to give such notice, and their neglect to do it would furnish no excuse for non-payment at the day.

"The fourth replication sets up a parol agreement of defendant made on receiving the promis-

sory note, that the policy should not become void on the non-payment of the note alone at maturity, but was to become void at the instance and election of the defendant, which election had never been made. As this supposed agreement is in direct contradiction to the express terms of the policy and the note itself, it can not affect them, but is itself void. We did hold, in Eggleston's case, it is true, that any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture. An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporary therewith, is void, and can not be set up to contradict the writing. So, in this case, a parol agreement supposed to be made at the time of giving and accepting the premium note can not be set up to contradict the express terms of the note itself, and of the policy under which it was taken.

"The last replication sets up and declares that it was the usage and custom of the defendants, practiced by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit, for thirty days thereafter; and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of 'leniency.' It can not be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not

> surprising, and should not be drawn to the company's prejudice, that they were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured at the time; and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an insurance company could never waive a forfeiture on occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and injurious to the public."

The obligation to pay these taxes is created by the most solemn form of agreement known to the law, a formal covenant. The law does not permit such an agreement to be changed by the mere acts of the parties *in pais*. An instructive case in this connection is that of *Oldewurtel* v. *Wiesenfeld*, decided in 1903 by the Court of Appeals of Maryland (97 Md., p. 165). The pertinent facts in that case were these: The lease under discussion was executed for a term of years, and subsequently the lessor agreed by parol that the rent should be reduced for a period of six months. The lessee subsequently paid the rent as reserved in the original lease, the lessor making a deduction from the total as verbally agreed upon. In an action of covenant to recover the rent accruing thereafter, it was held that there had been no such waiver or alteration of the original lease as to defeat the lessor's right to sue in covenant. It was strongly urged that the specialty in that case had been altered by parol and, therefore, the whole contract had become a simple

one and the original covenant had been waived. The court, however, held (p. 173) that:

> "The mere credit or reduction of the rent for six months to the extent of $10 a month, when the defendant, at the end of the six months, paid the rental reserved in the lease, and continued in possession according to the terms of the lease, without a new agreement, can hardly be held to be such a waiver, alteration, or abandonment of the lease as to defeat the action in this case."

Mrs. Kennedy's (the lessor) conduct in herself paying the taxes and then having the lessee refund them to her was at the most a gratuitous act of favor on her part, for which she received no consideration. It still remained the lessee's covenant duty to herself in the first instance pay these taxes when due to the corporate authority. This line of conduct on the lessor's part did not divest her of her right to at any time require the lessee to literally perform her covenant. After the original lessee's death, Mrs. Kennedy pointedly, in December, 1897, told the assignee's son, Joseph King, who communicated this information to the assignee's financial manager, Harry King, that she had forgotten to notify that the taxes were due and asked to have them paid; that this action of hers was thoroughly understood is shown by the fact that, without any further action on her part, Harry King sent in July, 1900, and again in May, 1901, to perform, too late, his covenant duty.

This is so important that it must be referred to more in detail.

It can not be said that either the nominal complainant, Caroline King, or the real complainant, Harry King, was in anywise misled by the conduct of Mrs. Kennedy in herself paying the taxes and receiving a reimbursement for such payments from the original lessee, H. King, Jr. As has been said, the

original lessee died on the 15th day of August, 1897. An instalment of the taxes due on June 1, 1898, became payable in November. The testimony of Joseph King (Rec. p. 154), is to the effect that a couple of days before Christmas, 1897, Mrs. Kennedy said to him that "she had neglected to notify us (the Kings) in reference to the taxes, and if we wouldn't have them paid, and I said I would go up and tell my brother and notify him at once; that she needn't worry, it would be attended to."

Q. Did you notify your brother?

A. Yes, sir; I went that night and told my brother, Mr. Harry King.

Q. That is the only occasion you recall that she discussed taxes with you?

A. Yes, sir.

Turning to the testimony of Harry King in this connection, we find the following (Rec. pp. 187, 188):

Q. You say you were the administrator? A. Yes sir.

Q. Your father left no will? A. Yes, sir; he did.

Q. Then you were his executor? A. No, sir; I was administrator with the will annexed. My mother was unable to attend to it.

Q. Then it was you, who, under the order of the court, sold this lease to your mother? A. The lease and stock; yes, sir.

Q. You knew what was in the lease, I suppose? A. No, sir; I did not.

Q. Did your mother know what was in the lease? A. No, sir.

Q. You sold and she bought without knowing what the lease was? A. Yes.

Q. Did you, in point of fact, know or did your mother know, to your knowledge, that according to the lease the lessee was bound to pay the taxes? A. We knew it from the fact that we had paid the taxes before.

Q. You knew when taxes accrued in May and

November of each year as a rule, although there had been exceptions, did you not? A. Yes, sir.

Q. When November of 1897 came around you did not receive any notification from Mrs. Kennedy about taxes? A. No, sir.

Q. But you say you learned in December of that same year, shortly before Christmas, that she had neglected to give you notice? A. Yes, sir; but she did not give that message to me. She gave it to my brother, and my brother, in turn, gave it to me.

Q. Did you inform your mother of it? A. Yes, sir.

Q. And thereupon the tax was paid? A. I don't know whether I informed my mother or not. I can not recall that I did, because I did not tax my mother with business concerns. I attended to it myself. It is most likely I did not tell her.

Q. At any rate you knew it? A. Yes, sir.

Q. You were manager of her business also, were you? A. Yes, sir.

Q. In point of fact you conducted her business for her, did you not? A. Yes, sir.

Q. As you had done for your father during the last years of his life? A. Yes, sir.

Q. Your mother did not take any active part in the financiering and management of it at all; did she? A. No, sir.

Q. So that really you were the manager? A. Yes, sir.

Q. And you had it pointedly brought to your attention in December of 1897 that taxes had been due the preceding November that you were bound to pay and which had not been paid? A. Yes, sir.

Q. When May came around what did you do? A. I did not do anything. I had not charged my mind with it at all.

Q. You knew you were to keep these taxes paid? A. Yes, sir.

Q. You knew the taxes were levied annually against the premises? A. Yes, sir.

Q. You knew they were payable twice a year? A. Yes, sir.

Q. When November, 1898, came around what did you do about these taxes? A. I did not do anything for the same reason I stated before.

Q. When May, 1899, came around, what did you do about these taxes? A. Nothing, for the same reason.

Q. When November, 1899, came around, what did you do about these taxes? A. Nothing.

Q. When May, 1900, came around, what did you do about these taxes? A. Nothing at all.

Q. Now, Mr King, I ask you again, for the sake of having no possible mistake about it, if you are certain that you received no letter from Mrs. Kennedy with respect to these taxes down to May, 1900? A. Yes, sir; sure.

Q. You are certain of that? A. Positive.

Q. And no verbal demand of any sort? A. No sir.

It is apparent from the foregoing testimony that the taxes on the property in question here were not paid from December, 1897, until July, 1900, not by reason of any mental distress on the part of the financial manager, Harry King, or from any lack of knowledge on his part that the lessee was bound to pay them, or from any misconception that Mrs. Kennedy expected to pay them herself and have the lessee reimburse her, as she had done in the lifetime of the original lessee. He knew well that she expected them to be paid directly by the assignee of the lease.

This is also apparent from his conduct when Wiltsie (the purchaser of the tax title) wrote to him on July 24, 1901.

Although this matter will be referred to again under the head of *Laches*, it is so important in this connection that it must be given in detail here.

This letter will be found at page 285 of the record. It is as follows:

ROCHESTER, N. Y., *July 24, 1901.*

MRS. CAROLINE KING.

DEAR MADAM: At the tax sale held in April, 1899, at the District building, Washington, D. C., by the collector of taxes, there *was* sold to me the lands and premises described as sublot A, square 432, assessed in the name of Maria T. Gillis.

The right to make redemption through the office of the collector of taxes, expired last April, and settlement must now be made directly with me. I am willing to surrender the tax certificate and to cancel my claim upon a very reasonable basis, *if you give the matter immediate attention.* Delay will increase the charges against you.

I paid for the certificate in April, 1899..	$143 83
There is to be added interest at the statutory rate of 15% per annum, from April, 1899, to date of payment, 2 years and 4 months.....	$
Charge for releasing which I will state definitely as soon as I know that you are the owner, or otherwise interested	$
Total.....	$

Immediate payment and settlement should be made. I am now entitled to a deed to the property; but I will surrender the tax certificate without obtaining a deed, if you will give this matter immediate attention. Delay will be entirely at your own risk.

If I do not hear from you *within ten days*, I shall conclude that you have no interest in the property and have abandoned it, and shall consider myself at liberty to take title to the property by deed.

Answer at once by enclosed envelope. *This notice is sent only as an act of courtesy.*

Respectfully yours. C. H. WILTSIE.

P. S.—I am informed that you are interested in the premises as owner or mortgagee. If I am wrongly informed, *I shall esteem it a favor if you will kindly state that fact and give me the name and address of some interested party.*

A reply was made to this July 30 (Rec. p. 173), as follows:

WASHINGTON, D. C., *July 30, 1901.*

Mr. CHARLES H. WILTSIE, *Rochester, N. Y.*

DEAR SIR: We are in receipt of your communication in reference to sublot A, square 432, assessed in the name of Maria T. Gillis, and in reply will say that we are willing to pay a reasonable amount for the redemption of same.

Please advise us and oblige.

H. KING, JR.

Copy.

Thereupon, on August 1, Wiltsie replied as follows (Rec. p. 174):

August 1, 1901.

H. KING, JR., *810 7th street, N. W., Washington, D. C.*

DEAR SIR: Your letter of July 30, with reference to tax certificate against sublot A, square 432, in the name of Maria T. Gillis, has been duly received. I will assign or surrender this certificate upon the following computation:

Face of certificate	$143 83
Recorder's fee	10
Aggregate	$143 93
Interest two years, four months, at 15 per cent	50 38
Charge for releasing	100 00
Total	$294 31

Please send New York draft or postal money order and I will send the tax certificate directly to you; or, if you prefer, notify me as soon as you are ready to make payment and the certificate will be sent to the Central National Bank of Washington, which is my fiscal agent, where the papers will be open to examination and payment can be made. The papers will be duly released and also assigned in blank, so that any name can be inserted.

Respectfully yours,

G. E. R. KLEIN, *Clerk.*

In correspondence please refer to serial 909 Wash. 99.

Send only N. Y. exchange or postal money order. Local checks subject to collection charges.

909–Wash.–99.

WASHINGTON, D. C., *Aug. 10, 1901.*

CHAS. H. WILTSIE, *Rochester, N. Y.*

DEAR SIR: In reply to yours of 1st inst., 909 Wash. 99, we beg to say that our Mr. Harry King is out of town at present. On his return next Monday we will lay your letter before him for reply.

Truly, H. KING, JR.

Copy. R. W.

On September 17, Wiltsie's clerk wrote again as follows (Rec. p. 175):

909–Wash.–99.

September 17, 1901.

H. KING, JR., *810 7th St., N. W., Washington, D. C.*

DEAR SIR: I write to call your attention to the delinquent tax sale certificate which I hold against sublot A, square 432, in the name of Maria T. Gillis, and to ask when same is to be taken care of. In your letter of August 10, you stated that Mr. Harry King would give this matter attention upon his return the following week. I have heard nothing further with reference to the matter, and I shall esteem it a favor if you will write me by

return mail stating when this matter is to have attention. I am desirous that the certificate should be taken up at an early date.

Very respectfully yours,

N. E. R. KLEIN, *Clerk.*

In correspondence please refer to serial 909–Wash.–99.

In reply to this the witness, Harry King, wrote as follows (Rec. pp. 55, 56):

WASHINGTON, D. C., *Sept. 21, 1901.*

Mr. CHARLES H. WILTSIE, *Rochester, N. Y.*

DEAR SIR: I have just returned to the city, having been away for a considerable length of time, and in reply to your communication will say that we are desirous of taking up the certificate that you have, but the $100.00 redemption is very large. In view of the fact that the penalties on this property are heavy and the amount for which it was sold was very small, I think that a redemption of $50.00 would be about just and equitable. I hardly think it is your desire to squeeze us or to be unreasonable. *Unfortunately we have paid you quite a considerable amount of money in the past for tax sales.* We are not interested in this piece of property in any way except as tenant, as we are not the owners or the mortgagees. If it should meet with your approval send us a bill and we will send check.

Respectfully yours, HARRY KING.

Dict. H. K.

Thereupon, on the 24th of September, 1901, Wiltsie's clerk replied as follows (Rec. pp. 175–176):

909–Wash.–99.

Sept. 24, 1901.

HARRY KING, *812 7th St. N. W., Washington, D. C.*

DEAR SIR: Your letter of September 21st addressed to Mr. Wiltsie with reference to the redemption of the delinquent tax sale certificate

which he holds against sublot A, square 432, assessed in the name of Maria T. Gillis, has been duly received. You state that you think the charge for the release of this certificate is too much. Mr. Wiltsie is absent from his office and I have no authority to make any concessions on such certificates, but if you will take up this matter promptly I will assume the responsibility of accepting $75 for the release of this certificate. There is now two years six months' interest due and I make a computation on this basis as follows:

Face of certificate	$143 83
Recorder's fee	10
Aggregate	$143 93
Interest two years six months at 15 per cent	53 97
Charge for releasing	75 00
Total	$272 90

Believing that you will accept this offer, I have today sent these papers to the Central National Bank of Washington, with receipt on you for $272.90, where they will be open to your examination, and payment can be made. Please call at the bank upon receipt of this letter and take up the papers promptly.

Very respectfully yours,

E. J. WATSON,
Mang. Clerk.

Dic. (E. J. W. /N.)

The witness Harry King is asked by his counsel (Rec. p. 176), as follows:

Q. Do you recall whether you replied to the letter of September 24?

A. I can not say that I did.

Q. What is the next thing that occurred with regard to this Wiltsie tax purchase?

A. I received a letter from Mrs. Kennedy informing me that the lease had been forfeited.

This letter (Ex. C. to bill, Rec. p. 201) is dated October 1, 1901, and notifies Mrs. King that by reason of her neglect to pay the taxes her (Mrs. Kennedy's) property had been twice sold at tax sale, and that she declined to receive any further rental from her (Mrs. King) by reason of the lease being thus vitiated.

It appears from the testimony of the witness Harry King (Rec. p. 178), that as soon as he received this letter from Mrs. Kennedy he had a certified check drawn up for the amount of the taxes, with the penalty, bonus, and interest. He went over with the certified check to the Central National Bank, and there learned that the tax certificate had been recalled by Wiltsie on the afternoon of the preceding day (Rec. p. 179). On the next day he had a conversation with Webb (Rec. p. 180); and then, on the advice of Mr. Tobriner, telegraphed to Wiltsie (Rec. p. 181) as follows:

October 2, 1901.

CHARLES H. WILTSIE, *820 Powers Bldg., Rochester, N. Y.*

Called at bank. Find certificate recalled. Have mailed certified check. Send me certificate. Answer my expense.

HARRY KING.

That he then went back to his store and immediately had a letter written, and mailed a certified check to Mr. Wiltsie at Rochester; that he received the following telegraphic reply (Rec. p. 181):

ROCHESTER, N. Y., *Oct. 2, 1901.*

To HARRY KING, *812 Seventh St. N. W.*

Certificate redeemed. Check will be returned.

E. J. WATSON,
Mg. Clerk.

That he subsequently received the following letter from the said Watson:

CHARLES H. WILTSIE, Attorney and Counsellor,
820 Powers Bldg., Rochester, N. Y.
October 3, 1901.

DEAR SIR: Your letter of October 2, enclosing certified check payable to Mr. Wiltsie's order for $272.90, has been duly received. Your telegram was received yesterday and I also telegraphed you in reply, stating that this certificate had been redeemed and that I would return your check. I herewith return this check as we do not hold the certificate any longer.

Respectfully yours, E. J. WATSON,
Mang. Clerk.

That he then sent Mr. Wiltsie another telegram, as follows:

Oct. 3, 1901.

To CHARLES H. WILTSIE, *820 Powers Bldg., Rochester, N. Y.*

Wire at my expense name of party who has redeemed Maria T. Gillis' certificate.

HARRY KING.

To which he received no reply; and this ended the correspondence with Wiltsie.

As a matter of fact Harry King did not pay the taxes or any of them. He was not misled in this regard, as has already been shown, by any one. It was merely negligence, or financial inability to pay.

He admits that he voluntarily and without notice from Mrs. Kennedy or any one sent in July, 1900, to pay them. He did so because he then recollected or chose to take up a neglected duty. Again, he sent to pay them in May, 1901. Why? No one had asked him to.

He did not pay taxes on back parts of demised premises.

When he became the assignee of this lease he was bound at his peril to find out the extent and application

of the lessee's covenants and to perform them. He has not done so.

The promptness and alacrity with which King attempted to take up the tax sale certificate after receiving Mrs. Kennedy's notice of forfeiture, the extraordinary efforts by telegraph and mail, and the sending of certified check for the amount are in striking contrast with the utter indifference and practical refusal to redeem shown between July 24, when notified by Wiltsie, and the 1st of October. It is an entirely just, if not conclusive, inference from the evidence that if the Kings could have kept Wiltsie at bay they would have left the tax sale unredeemed to the end of the lease and then walked out of the premises and left Mrs. Kennedy to settle with Wiltsie as best she could.

It is most significant and inexcusable that Mrs. Kennedy and her counsel, Webb, were kept in ignorance of all of these circumstances so vital to her interests.

It is not pretended that Harry King or any one gave her any notice of them until a stranger, Knight, for purposes of his own not at all connected with any party in interest, called Kann's attention in September, 1901, to the fact of the irredeemable tax sale (Rec. pp. 4, 286, 447, 448).

We submit that this question must also be answered in the negative.

The discussion of this question concerns the sixth and seventh assignments of error.

QUESTION VI.

What Diligence Must a Complainant Show who Applies to a Court of Equity for Relief Against a Forfeiture Declared by the Landlord on Account of Such a Breach?

All statutes of limitations are founded upon the maxim *Vigilantibus non dormientibus jura subveniunt.* While this is a legal maxim it is especially potent in a

court of equity. Its application is made the subject of Section VIII, Chapter First, Part Second, of the last edition of Pomeroy's Treatise on Equity Jurisprudence. The learned author quotes with approval Lord Chancellor Camden's words in the case of *Smith* v. *Clay*, 3 Brown's Ch. 638, as follows: "*Nothing can call forth this court into activity but conscience, good faith, and reasonable diligence.*" This is not, of course, merely diligence in seeking a legal remedy. It comes, as Pomeroy says (sec. 418) under the larger maxim: *He who seeks equity must do equity.*

How little diligent in the premises the complainant has been appears from the testimony next hereinbefore quoted, showing that she not only neglected her covenant duty for more than two years, but also was most negligent in attempting to repair, as far as she could, the very dangerous consequences of that prior negligence.

The discussion of this question concerns the seventh assignment of error.

QUESTION VII.

Where the Tenant Has Not Only Allowed the Demised Premises to be Sold for Taxes, but Has Continued His Breach Until a Tax Deed for the Demised Premises Has Issued to an Assignee of the Purchaser, Can the Tenant Litigate the Question of the Validity of That Tax Sale with the Holder of the Tax Title at the Risk of the Landlord?

As will presently be shown more in detail, when the landlord learned that her land had been sold for taxes, and that an irredeemable tax title thereto had been acquired by a third party, she entered into negotiations with the defendants Kann through the defendant Cohen looking to a lease of the premises in question to them. They agreed

to pay $1,200 more of annual rental than the complainant was paying. This was satisfactory to Webb, acting for Mrs. Kennedy, and, thereupon, the letter (Rec. p. 20) was written forfeiting the lease. Thereupon, after certain occurrences and interviews, which will be recurred to, this bill was filed by the tenant, to hold, by injunction, the landlord's hands, while the tenant litigated, at the landlord's risk, the question of the validity of the tax title in question with the Kanns, who had bought it through Cohen.

Counsel do not understand that there is any rule of law which prevents a landlord and tenant from agreeing that as between themselves what is ordinarily a primary duty of the landlord shall become a primary duty of the tenant; that after such agreement has been made the landlord is under an obligation to constitute himself the guardian of the tenant and to overlook under some indefinite penalty the conduct of the tenant in observing or failing to observe that tenant's own agreement. We do not understand that where a tenant has covenanted to pay taxes and has failed to do so and the demised property has been sold for taxes, it lies in the tenant's mouth to say to the landlord that he ought to have been on the lookout for the tenant's violation of his covenant, nor can we understand that when the landlord endeavors to regain possession of the premises it again lies in the tenant's mouth to say to him: "True, I got these premises from you; true, I have allowed a tax deed for them to be given to a third person; true, if you can get possession of them from me you may be able to compromise this tax title with this third person, but I intend to resist your claim to recover possession and to deprive you of the chance to retrieve the disaster which I have brought upon you, because this tax title may be valid and, therefore, you can not legally recover the possession which you gave me of premises formerly your own."

Counsel, speaking with all deference and respect, can not conceive this to be the law.

In the case of *Bacon* v. *Park*, 19 Utah R., p. 46, *supra*, the following language, used by Baskin, J., is very pertinent:

> "By the covenants of the lease of said premises, in case of default the lessor was authorized to re-enter without notice and forfeit the lease. It required no accounting to fix the amount of said taxes. The plaintiff, by going to the treasurer's office, could have ascertained the amount; and if he intended to keep the covenants of the lease it was his duty to do so, and, when ascertained, to pay the amount, without applying to the defendant Park (lessor) for such information. He knew that the premises had been sold for delinquent taxes, and that the time for redemption would soon expire, and that if the redemption was not made that Hamilton Park's title to the premises would be defeated."

The following language of the court is also especially relevant, in view of the fact, admitted upon the face of the bills in this case that after the lessee knew not only that the property had been sold for taxes, which she had covenanted to pay, but that that sale had ripened into a deed and was irredeemable, she still, when possessed of such knowledge, wasted weeks in a negotiation with the holder of the tax title, endeavoring to obtain better terms from him:

> "The plaintiff (lessee) was aware of the covenants in the lease relating to forfeiture. He knew that default had been made in the payment of taxes for several years (the deficit for taxes amounting to about four thousand dollars), and that the premises had been sold for the non-payment of the same, and that the time to redeem had nearly expired; yet he did not intend to redeem until the last day. Such intention and such

> delay was a gross violation of the covenants of the lease. The evidence shows that Mr. Park (the owner of the premises) was in straitened circumstances. His property was in danger of being sacrificed for the non-payment of taxes. *By forfeiting the lease he ascertained that he could raise the money necessary to redeem the property by re-leasing the same. It would have been reckless on his part to let such an opportunity pass, and it was absurd for the plaintiff to expect that the lessor would not assert his right of forfeiture for the non-payment of taxes until the last day for redemption of the same from the tax sale.* Equity will not relieve against a forfeiture of a lease where the breach of the covenants has been so culpable, long persisted in, and detrimental as the evidence in this case shows the breaches to have been."

Yet, in the case at bar the Court of Appeals decided that the landlord's hands must be tied by the law while reaching out to protect herself from the tenant's breach of covenant. Not only that, but the landlord must be deprived by the law of the benefit of a negotiation with the Kanns to save her property while the tenant is permitted to fight the Kanns at the risk of the landlord with respect to the validity of a tax title incurred by the tenant's breach of covenant.

But the Court of Appeals go to a still greater length and say (21 App. D. C. p. 152):

> "It is true that in this case a tax deed has actually been issued, and the ultimate mischief has apparently been done. *But the position of the appellant (Webb) in regard to this does not seem to be entirely consistent. Either this tax deed is valid or it is invalid. If it is valid, then the appellant's title to the property is gone, and he has no right to enter and dispossess the lessee.*"

That is to say, the defaulting tenant, who has done all the mischief, can defy the landlord, from whom he received possession, and can thus prevent the landlord from regaining possession and with it saving himself from the ruin brought upon him by the tenant, on the ground that the landlord has lost title and right of possession through the tenant's own act.

With great respect for the Court of Appeals it is urged that this can not be law.

This question concerns assignment of error numbered seven.

QUESTION VIII.

Is Not a Bill in Equity Which Attempts to Enjoin the Enforcement of a Forfeiture Declared by the Landlord by Reason of Such a Breach, and Also to Adjudicate the Validity of Such Tax Sale, Multifarious?

It is not easy to reconcile the decisions of the Supreme Court of the United States upon this point.

What is or is not multifarious is, it seems, a question to be determined in each particular case. It is stated by Judge Story, Section 271 of Story's Equity Pleading, that:

> "By multifariousness in a bill is meant the improperly joining in one bill distinct and independent matters, and thereby confounding them; as, for example, the uniting in one bill of several matters, perfectly distinct and unconnected, against one defendant, or the demand of several matters of a distinct and independent nature against several defendants in the same bill. In the latter case, the proceeding would be oppressive, because it would tend to load each defendant with an unnecessary burden of costs, by swelling the pleadings with the statement of the several claims of the other defendants with which he has no

> connection. In the former case, the defendant would be compellable to unite, in his answer and defense, different matters, wholly unconnected with each other; and thus the proofs, applicable to each, would be apt to be confounded with each other, and great delays would be occasioned by waiting for the proofs respecting one of the matters, when the others might be fully ripe for hearing. Indeed, courts of equity, in cases of this sort, are anxious to preserve some analogy to the comparative simplicity of proceedings at the common law, and thus to prevent confusion in their own pleadings, as well as in their own decrees."

Testing these bills by these general principles, we find that the case made against the lessor concerns only herself and the complainant. Whether or not the lessee has forfeited her lease is a question that in no wise concerns any other party to these proceedings.

Turning now to the averments of the bill respecting Cohen and the Kanns, the contention between them and the lessor and owner is something that the complainant has nothing to do with. Whether or not through the complainant's default Cohen and the Kanns have obtained a valid title to the lessor's property is a question that the complainant can not litigate, and with which she is not legally concerned. It is a question which she can not force the lessor to raise or to contest. She has no title upon which the tax deed in question can be a cloud. If the Kanns or any one claiming under this tax deed were to attempt to dispossess her tomorrow morning, she could make her defense in ejectment; but that is all she could do. If the lessor chose to abandon the property to the claimant under the tax deed the complainant could not prevent her doing so. A court of equity has no jurisdiction to compel the lessor to litigate with the holder of a tax title. It has no power to enable the complainant to so litigate. The complainant's

alleged right is merely a possessory one, and is personal property only. She is not in a position, and can not be put by the court in a position, to litigate the question of the validity of this tax title.

It is therefore submitted that the complainant's bill is multifarious, in that while it should be a bill against Webb only, and for the canceling of a forfeiture only, it is a bill for those purposes and also for the purpose of litigating the validity of a tax title as between the complainant and the holders of that title, which can not be done.

It is not necessary to consider the long line of Supreme Court cases which were cited by counsel upon the other side in argument below, because it will, of course, have to be conceded that the bills referred to in those cases were not multifarious. It will be found, however, upon an examination of them, that not one of them justifies such a joinder of parties and of subject-matter as is here attempted.

The discussion of this question involves the eighth assignment of error.

QUESTION IX.

Was Not the Lease in Question Procured Under Such Circumstances (Disclosed by the Evidence) as Will Induce a Court of Equity to Look Unfavorably Upon It?

While the exact age of Mrs. Kennedy was not given in testimony, nevertheless her extreme age and fatal illness abundantly appear from the proceedings.

On page 22 of the record Mr. Webb says, in a letter to Messrs. Darlington and Tobriner:

> "I beg to advise you that I am and have been for some time the counsel of Mrs. Kennedy,who is a very aged woman, and I have to request that any future communications with reference to her business be addressed to me."

In answer to this letter (Rec. p. 22), Messrs. Darlington and Tobriner wrote:

> "But inasmuch as Mrs. Kennedy is a woman of advanced years, in a question of notice and serving of process which may hereafter become material, it might be well for your own as well as for our protection that you have Mrs. Kennedy advise us that you are authorized to accept all notices to her and service of process against her."

Finally, at page 411, Mr. Darlington, upon the cross-examination of the defendant Cohen, asked these questions:

> "Q. You knew Mrs. Kennedy? A. Yes, sir. Q. You knew she was a very old lady in frail health? A. Yes, sir. Q. And that her physician thought this litigation would be dangerous to her life and health? A. Which litigation? Q. Litigation over this tax title, this tax sale, this forfeiture. A. Not necessarily that litigation. Q. What litigation would do so? A. Dr. Fry said his patient was liable to be seriously affected in her health if litigation should ensue."

Mrs. Kennedy, in fact, did die upon the 4th day of December, 1901 (allegation of bill of revivor, Rec. p. 26).

A not insignificant fact in this connection is furnished by the renewals of the lease in question. The original lease (Rec. pp. 3–16) was made on the 8th day of July, 1890, when Mrs. Kennedy, assuming her to have been 80 years of age at the time of her death in 1901, was 69 years of age. It created a term of three years ending on October 1, 1893. On the 27th day of December, 1892, this lease was extended for five years, which would bring it up to October 1, 1898. On the 8th day of October, 1896, it was extended for five years with an option of five more years, which was interpreted by all parties as an additional extension for ten years, thus

bringing the term up to the 1st day of October, 1908. It is admitted in the original bill (Rec. p. 5) that the rental value of the demised premises has somewhat increased since the time said lease was entered into. The rent reserved was twenty-four hundred dollars per year and the taxes and repairs, which amount to about two hundred and ninety dollars per year (Rec. pp. 333, 334). This would make an annual rental of about twenty-seven hundred dollars in round numbers.

There is no direct evidence of the value of the premises in question or of the lease thereupon. In the original bill of the plaintiff (Rec. p. 3) this property is said to be "worth a large sum of money, to wit, not less than fifty thousand ($50,000) dollars." In the answer of the defendant Webb (Rec. p. 84), it is said:

> "This defendant is not able to state whether the amount of said estate will largely exceed in value the amount of said legacies" (about $40,000).

At page 432 of the record the defendant Webb, in his testimony, answered the question:

> "Q. What led you to fix the sum of $70,000 for the proposed bond? A. I figured up that $3,600 which the Kanns offered to pay was 5 per cent of $72,000. I consequently settled on $70,000 for that reason."

Upon recurring to the lease in question (Rec. p. 14) it will be seen that the lessee was not only bound to pay taxes, but also to repair the demised premises. Under the lease the yearly rental amounted to $2,400, the taxes amounted to about $290, and the repairs would hardly be less than $300, so that the tenant under this lease paid in round numbers a yearly rental of $3,000. For

many years in this District it has been a matter of common knowledge that landlords are fortunate who are able to realize a net return of 5 per cent upon rented real estate. According to that computation the premises in question would be worth $60,000. Now it is in evidence that the Kanns in the early part of 1901 were willing to take this lease at an increased rental of $1,200, and also to pay all taxes and improvements (Rec. p. 305). Applying the same computation, we have $4,190 as the annual rental which the Kanns were willing to pay, which would be 5 per cent of $83,800, Recurring to the last renewal of the lease for ten years (Rec. p. 16), it will be seen that it was made on the 8th day of October, 1896, and was, as has been said, to expire on the 1st day of October, 1908. It is submitted that this last extension was so obviously unfavorable to Mrs. Kennedy's business interests that her agreement to such a term for the rental reserved is a persuasive argument as to her inability, even at that time, to properly protect her own interests as against parties who were certainly competent to protect their own interests.

It is not said or intended to be said that she was unable to make a valid deed or contract. What is meant is that she was in a position to be taken advantage of, and that advantage was in fact taken of her.

If this were a case of specific performance the court would judge of the fairness of this lease.

In judging of the fairness of a contract, the court will look not merely at the terms of the contract itself.

Upon this subject Fry says in his book on Specific Performance, sec. 380, as follows:

> "In judging of the fairness of a contract, the court will look not merely at the terms of the contract itself, but at all the surrounding circumstances, such as the mental incapacity of the parties, though falling short of insanity, *their age*,

> or poverty, the manner in which the contract was executed, the circumstances that the parties were acting without a solicitor, that the property was reversionary, or that the price was not the full value."

Where a young man, just arrived at his majority, contracted for the purchase of land, after an examination utterly insufficient to ascertain its value, with a person who was more than a match for him, from his want of sagacity, experience, and advice, and who described the advantages of the purchase in exaggerated terms, for a grossly inadequate price, the court refused to decree specific performance against him, although there was no fraud nor [illegible]ral incapacity to contract on his part.

G[illegible]. Small, 2 Strobh's Eq. 72.

Again, at section 382, the same author says:

> "It is enough, generally speaking, to induce the court to refuse performance, that there are any circumstances about the making of the contract which render it not fair and honest to call for its execution; it is not needful that there was any intentional unfairness or dishonesty at the time."

While these are cases of specific performance which are referred to, nevertheless the principle applies with even greater force to cases of relief from forfeiture. Where an experienced business man has made an unfair bargain with an old woman, a court of equity will not help him to keep her under the burden when he has negligently allowed it to slip off her shoulders, and she has become free.

The discussion of this question involves the first, second, third, and fourth assignments of error.

QUESTION X.

Do the Pleadings and the Evidence Disclose Any Case of Fraud on the Part of the Defendant or of Accident or Mistake on the Part of the Complainant Which Would Constitute a Ground of Equitable Relief?

The consideration of this question requires a somewhat detailed statement of the testimony.

The original lessee, Harry King, Jr., died August 15, 1897 (Rec. p. 165).

Upon his death his affairs were found to be very much embarrassed. This is set forth in the original bill and is insisted upon in the testimony of the witness, Harry King, as follows (Rec. p. 185):

> "Q. How soon after your father's death was it that his estate became involved in litigation? A. In actual litigation? Q. Yes. A. I should suppose that it was a year afterwards that it was involved in actual litigation; but our creditors had been pressing for their money ever since my father's death. Q. From the time of your father's death you were very much involved? A. Yes, sir."

On the 25th of August, 1897, it appears that the said Harry King, who had been appointed administrator c. t. a. of the estate of his father, Harry King, Jr., filed a petition in the Orphans' Court, which petition the court is asked to read in full. It will be found at pages 208 and 209 of the record. The first paragraph of the said petition avers that the stock in trade and fixtures in stores numbered 812 and 814 Seventh street and 715 Market space (the last number being the premises in question), and also certain horses and wagons and harness used in connection with the said stores, have been appraised by the official appraisers of the Orphans' Court at the sum of $3,315. The second paragraph of said petition

sets forth the substance of the leases of premises situate at 812 and 814 Seventh street and 715 Market space. The third paragraph of the said petition is as follows:

> "The petitioner further represents that he has requested the said appraisers to place a value upon the said several leasehold interests, but that the said appraisers refuse to do so, claiming that the rent reserved by the said several leases is larger and greater than what the said premises would at the present time rent for under a new lease; and your petitioner believes that such is the case and that the said leasehold interests are of no practical value as an asset of the said real estate."

The petitioner then sets forth an offer of $3,500 cash from the widow, Caroline King, for the purchase "of the said stock in trade and fixtures and said leasehold interests." The petitioner adds—

> "that he feels satisfied, from his intimate acquaintance with the character of said stock, having been many years engaged in the millinery business, that nothing like its assessed value can in any other manner be realized."

The petition concluded with a prayer that private sale of the above assets for a sum not less than their appraised value be authorized by the court. This petition was prepared by Mr. Tobriner (Rec. p. 42), and sale as asked for was in fact made to Mrs. Caroline King (complainant) for the sum of $3,500 cash (Rec. p. 165). Right here it will be observed that in this petition the lease of the premises in question is recited as a lease for a term "of five (5) years from the eighth (8) day of October, A. D. 1896," a period of seven years less than the true term.

Shortly after the original lessee's death a creditor's bill

was filed against his estate in the Supreme Court of the District of Columbia.

It does not appear from the record exactly when this original bill was filed by the Ohio National Bank, of Washington, D. C., by Messrs. Worthington, Heald & Frailey, as solicitors, and by the Second National Bank, of Washington, D. C., against Caroline King and her sons, upon which bill Judge Barnard, then a practicing attorney at our bar, and the said Harry King, were appointed receivers of the court of the assets of the original lessee. It does, however, appear that this was done within a year of the original lessee's death.

Upon the 24th day of June, 1901, a third amendment was filed to the original bill of complaint, and this amendment is set out in full at pages 215–218 of the record. This amendment attacks the sale from the administrator c. t. a. to the widow for actual fraud, and charges the said Harry King with perjury in connection therewith. It is further averred (Rec. p. 217) that the lease of the premises in question was at the time of said sale and also at the time of filing of said amendment worth at least $10,000. It further avers that in the month of November, 1898, Harry King was offered $10,000 for the lease of the premises in question, but that the said Harry King demanded $35,000 therefor.

On the 13th of August, 1901, Harry King filed his answer to the said amendment, which answer was also prepared by Mr. Tobriner (Rec. p. 242). Mr. Tobriner also prepared the assignment of the lease from Harry King, administrator c. t. a., to Caroline King (Rec. p. 242). In this answer Harry King states, under oath, as follows (Rec. p. 220):

> "That the lease mentioned in said petition and referred to in said amended bill was at that time bearing a very large and expensive rental; the various amounts due thereunder for rent were

overdue and unpaid, and the said lease was liable to forfeiture, and under the circumstances this respondent was of the opinion and still is of the opinion that the best thing which could have been done was to sell and dispose of the same at private sale in the manner that the said assets were disposed of; he further avers and says that it is untrue that the said lease could have been sold at a premium or bonus; that the same, because of the rental payable thereunder, were not salable, and of no value, and that no purchaser therefor could have been found."

Referring particularly to the leasehold interest in question (Rec. p. 221), he denies—

"that the leasehold interest for premises known as seven hundred and fifteen (715) Market space was on the twenty-fifth (25th) day of August, A. D. 1897, or now is, worth at least ten thousand dollars ($10,000), and could have been sold, or now can be sold, for that amount; he avers and says that with respect to said leasehold interests, that at the time he took upon himself the administration of his father's estate the neighborhood of said premises, seven hundred and fifteen (715) Market space, had greatly depreciated for business purposes, and that it is only within the last two years that it has again become useful and a fair stand for business purposes; that the rental for said premises is far beyond the rental produced by adjoining and neighboring properties of larger space and better improvements."

He further denies in the same answer that he received an offer of $10,000 for the said lease of the said premises, or that he demanded $35,000 therefor.

On page 207 he desires to make the following correction:

"The correction is that this check that I sent on August 11 to Mrs. Kennedy, after examining and

> finding out all the matter that I could get referring to this case, I did not know or did not remember at this time that the check had not been paid, but since then I have refreshed my memory, and I find that that check had not been paid. Therefore it left the rent of the Market space store unpaid."

At page 211 he says that the language of his answer with regard to the large and expensive rentals of the leases meant the leases on all the property. At page 212 he says:

> "I meant that the leases were liable to forfeiture; that the rent on 715 Market space had not been paid; there were two months' default in the rent of 814 Seventh street; there was one month's default in the rent of 812 Seventh street, which I have administration checks showing that the same was paid out."

This he subsequently contradicted.

Upon cross-examination in the case at bar, the witness King's attention was directed to the serious mistake in his petition for the sale of the lease in question, with respect to the unexpired term of the same. His attempt to explain this omission will be found at pages 209 and 210 of the record. He adds: "It is a typographical error, I suppose." Mr. Tobriner testifies (Rec. p. 252) as follows:

> "I must have had the lease, as well as I can remember, before me when I prepared the petition for the sale in the Orphans' Court, but there were so many endorsements on the lease, of extensions, that I must have made a mistake in calculating the time."

With respect to the averments in his answer to the third amendment in the Ohio National Bank case, the witness, Harry King, is still more unfortunate. At page 184 he is asked this question by his counsel:

> "It is claimed in one of the answers that in an equity suit of *The Ohio National Bank* v. *Caro-*

line King, No. 19,338 on the equity docket of this court, you stated that this lease was in default for rent and liable to be forfeited. Is that correct? A. That had no reference to 715 Market space. That had reference to the store on seventh street. The rent for them had been unpaid."

This he subsequently contradicted.

It appears by stipulation of counsel (Rec. p. 481) that subsequent to the testimony of the witness, Harry King, in equity cause 19,338, being that of the Ohio National Bank above referred to, the case was heard on the bill and answer, without the taking of testimony by either side, and that a decree was passed for the sale of the assets of Harry King, Jr., which decree does not attempt to include the lease of premises No. 715 Market space.

Harry King the Real Complainant.

Inasmuch as the natural grief of a widow is urged in the original bill (Rec. p. 3) as pertinent to her inattention to business matters, it is well to say that it appears from the testimony that her son, Harry King, was the business manager of the original lessee for some years prior to his death, as also of his mother, the complainant, after his death.

The testimony of Harry King is as follows (Rec. p. 184):

"Q. Mr. King, to what extent did you participate in the management of the business, during your father's lifetime? A. I was my father's general manager. Q. For some years prior to his death, you really managed and conducted the business; did you not? A. Yes, sir; I managed and conducted the business."

At page 193 he also gave the following testimony:

"Q. How long were you associated with your father, assisting him in business before his death? A. Since about 1888, I should say. Q. That is in the neighborhood of nine years? A. About that."

It further appears from the testimony of Harry King (Rec. p. 194) that his mother had no active share in the management of the business after she bought the lease. At page 194 of the record he testifies as follows:

> "Q. What relation did your mother have to the business? A. My mother occupied a position in charge of the salesroom, when she was there. Q. She had an active connection with the business? A. Not active at all times, but active at some times. My mother had not been a well woman. She has been quite sick, and she has been out of the store for some time. Q. Who, if anybody, chiefly had charge of the finances? A. I had charge of the finances."

Again, at page 187, he testifies as follows:

> "Q. You were manager of her business also, were you? A. Yes, sir. Q. In point of fact, you conducted her business for her, did you not? A. Yes, sir. Q. As you had done for your father during the last years of his life? A. Yes, sir. Q. Your mother did not take any active part in the financiering and management of it at all, did she? A. No, sir. Q. So that really you were the manager? A. Yes, sir."

It further appears that another brother, Joe King, was manager of the branch conducted at 715 Market space, the premises in question. At page 153 he testifies as follows:

> "Q. Where are you employed? A. 715 Market space. Q. Who is the manager of that business? A. I am the manager of the business 715 Market space."

Again, at page 155, he testifies as follows:

> "Q. When was it your father died? A. In 1897, sir; August 15. Q. And this was shortly before Christmas? A. Yes, sir. Q. And this was the first time you had seen her (Mrs. Kennedy), you

say? A. At that time; yes, sir. Q. What was your position in the store at that time? A. Manager. Q. Was your brother, Mr. Harry King, there? A. No, sir; I am the only person. Q. You are the manager of that branch? A. Of that branch, sir. Q. Was your mother there? A. No, sir; nobody but myself. Q. You yourself carried on the business there? A. Yes, sir."

The business relations existing between the widow and her sons are disclosed, as far as the record shows any disclosure, in the following testimony (Rec. p. 190):

Cross-examination of Harry King:

Q. Will you tell me, if you please, when the firm of Caroline King & Sons was formed? A. My mother gave us an interest in the business in the spring of 1898.

Q. Will you tell us who composed that firm? A. My brother Joe, my mother, my brother Abe for a short while, and myself.

Q. Were there any written articles of partnership? A. No, sir (Rec. p. 191).

Q. Who was authorized to draw checks relating to the business which your mother purchased in August, from August, 1897, up to the spring of 1898? A. I had a power of attorney.

Q. Did any one else have authority? A. I don't think so; I can not say.

Q. So that the only persons who were authorized to draw checks were you and your mother? A. I think that is the case. My brother also may have had a power of attorney. I don't remember that.

Q. After the spring of 1898, when this firm was formed, who had authority to draw checks? A. My brother and mother and myself.

Q. There were three sons, you, Joseph, and Abraham? A. Yes, sir.

Q. Abraham went out when? A. In a very short while.

Q. Was it a year? A. No, sir.

Q. A few months? A. Three or four months.

Q. And the business is still owned by your mother and your brother and yourself? A. Yes, sir; we have an interest in the business.

Q. Those three? A. Yes, sir.

Q. They are the only persons in the firm? A. Yes, sir.

Q. Each one of you three, since that firm was formed, had authority to sign checks? A. Yes, sir; I think that a short while ago we gave my brother Phil power to sign checks.

Q. He is not a member of the firm? A. No, sir. I can tell you why that was done if you would like to know.

Q. No; it does not interest me. When was the receivership on your father's estate created by the court? A. I think some time about a year afterwards or possibly three months longer. I can get the exact date.

Q. Has that receivership been terminated? A. No, sir.

Q. It still subsists? A. Yes, sir.

Q. So that prior to 1900 what you call the estate of your father was in the hands of receivers? A. Before that.

Q. I say that prior to 1900 and up to the present time the estate of your father has been in the hands of receivers? A. Yes, sir.

Q. And those receivers are yourself and Judge Barnard? A. Yes, sir. (Rec. p. 195.)

Q. I will have to trouble you to tell me what is the relative interest of yourself, your brother, and your mother in that business? A. We have a one-third interest in the profit of the business.

Q. Each of you? A. Yes, sir.

Q. Your interests are equal? A. Yes, sir. A one-third interest in the profits.

Q. Do you own, equally, the assets, and equally liable for the debts?

Mr. DARLINGTON: I object to calling on the witness for a legal opinion of what his liability is.

Q. What is your understanding of the agreement with respect to that? A. We have no agreement.

Q. You mean you have no written agreement? A. No, sir.

Q. Have you an interest in the business? A. I have a one-third interest in the profits of the business.

Q. And no interest in the losses? A. I don't know.

Q. Have you any interest in the assets? A. I could not answer that.

Q. You don't know? A. No, sir.

Q. You don't know whether or not you have an interest in any of the assets? A. No, sir.

Q. Does any of the merchandise in either of those stores belong to you? A. I really could not tell you.

Q. Have you any way of finding out? A. Not that I know of. It is a family affair, strictly,

Q. Still it is a firm? A. We call it so; yes, sir.

Q. Do you know whether your brother Joseph has any interest in the merchandise in those stores? A. He has the same interest in the business that I have.

Q. Do you know whether your mother has any? A. Yes, sir.

Q. But you don't know whether you own any part of it or not? A. No, sir.

Q. You don't know whether you are a partner or not? A. I have an interest in the business, and if you consider that a partnership, all right.

Q. Do you know in what month in the spring the firm was formed? A. That I could not say.

Q. Was it before or after May, 1898? A. It might have been after and it might have been before May. I could not tell you the exact date.

Q. It was in the spring? A. Yes, sir; in the spring.

Q. What did the assets then consist of? A. The general assets of the business.

Q. How was the rent for the property paid? A. The rent was paid out of the business.

Q. Out of the firm account? A. Yes, sir.

Q. To Mrs. Kennedy? A. Yes, sir.

Q. Up to 1901? A. Yes, sir; up to 1901.

It is thus apparent that neither the original lessee, H. King, Jr., nor his widow, Caroline King, are the persons with whom we are really concerned in this case. It is admitted that, for several years prior to the death of the original lessee, his son, Harry King, was the real manager of the business.

Failure to Pay Tax Either Intentional or Due to Great Inattention to Covenant Duty.

This being the situation, the next pertinent occurrence was that a few days before Christmas, in 1897, according to the testimony of the said Joseph King (Rec. pp. 154, 155), the lessor came to the premises in question and said to him—

> "that she had neglected to notify us in reference to the taxes, and if we wouldn't have them paid, and I said I would go up and tell my brother and notify him at once; that she needn't worry, it would be attended to."

It is not disputed that this tax was paid by Harry King.

It is equally undisputed that from that time (December, 1897,) until July, 1900, no one paid any taxes on the premises in question. But it is well settled law that the assignees of the original lessee are bound by the covenants of the lease.

It has been explicitly decided that where the original lease names the assigns of the lessee in a covenant to pay taxes, such assigns are bound (*Wickes* v. *Rudson*, 1899, 1 Q. B. 474). Many other authorities might be cited to sustain this proposition, but it is, we suppose, undisputed. This being the case, when the plaintiff bought from the administrator c. t. a. of the original lessee the lease in question, it was her duty to ascertain exactly what the obligations thus assumed by her were.

In this connection it becomes important to recur to the admitted fact that the covenant embraced two small parcels in the rear of lot "A" which parcels were just as much a part of the demised premises as was lot "A" itself. During the life of the original lessee, Mrs. Kennedy (the lessor) by mistake paid these taxes and was never reimbursed by the tenant. She ceased, however, paying them in 1897, and no act of hers can be said to have estopped her from claiming that the assignee should perform her covenant in full. It is undisputed that the assignee has never paid any taxes whatever on these rear portions and that repeated defaults have been made by her in that regard.

When we recur to main lot "A" we find that in December, 1897, Mrs. Kennedy, whatever she had done in the case of the original lessee, pointedly altered that practice when dealing with the assignee; instead of paying the taxes herself, she called the attention of the assignee to them and requested said assignee to pay them. Thereafter she took absolutely no action with respect to them.

Suspicious Testimony of Witness Rodgers.

Thereafter nothing pertinent occurred until July 24, 1900, when Harry King, according to his testimony, without any notice or suggestion from any one, happened to think of his obligation to pay these taxes, and sent his bookkeeper Rodgers to the tax office to pay all taxes on these premises (Rec. pp. 126, 171).

This is especially important as indicating that he fully understood that the duty of paying these taxes rested primarily upon hi : , and not upon the lessor. He says so unequivocally in his cross-examination (Rec. p. 187). Rodgers reported to him that certain taxes were due. Thereupon those said to be due were paid (Rec. p. 126).

Again, on the 21st of May, 1901, Rodgers was sent over

to the tax office by Harry King and had an interview with the tax clerk, which is given in full at pages 127, 128, of the record. As a result of this, he left the tax office with the assurance that all back taxes had been paid, and so informed Harry King.

As the testimony of this witness Rodgers is especially significant, the court is earnestly asked to read it carefully.

The testimony of this witness begins at page 126 of the record and continues to page 139. At page 140 he was recalled and his testimony continues to page 152. The significance of his testimony depends upon his statement that on the 24th day of July, 1900, he went to the tax office in this city and asked for the tax bills upon the premises in controversy, and received a bill for that year, and was told by the official on duty that the bill contained all the taxes which were then due upon that property: that he took the bill to the store and that Mr. King signed a check for it in the name of the firm and that he took it over and paid it and got a receipt (Rec. p. 136); that on the 21st day of May, 1901, he again went to the same office for the taxes of 1901, and the bill was handed to him. On the 24th day of May, 1901, Mr. Harry King signed a check for that bill, the witness took it over, and as three days had passed between the time he got the bill and the date of the check he asked again whether everything was all right, to which, after some conversation, the clerk answered that there were some back taxes on it; whereupon, after some more conversation with the clerk, he took all the bills that the clerk gave him back to Mr. King, had a new check made out, paid them, and got the receipted bills therefor.

If the testimony of this witness were true it tended to strengthen the case of the plaintiff. The case of *Noyes* v.

Anderson, 124 N. Y. 175, cited in the original brief of the defendant Webb, was used during the hearing of the interlocutory appeal. The court's recital of the facts of that case in its opinion was as follows:

> "It appears that he might have ascertained about it (the defaulted tax) at the office of the clerk of arrears, but when he paid the tax of 1886 at the tax office in the city the son was, upon his inquiry, informed by some one in the office that there was no sum due for any arrears against the property. It is clear that the purpose of the defendant's son was to pay the taxes and assessments, and that his failure to make an earlier payment in this instance was not wilful neglect on his part, nor was the plaintiff prejudiced by it."

Had Harry King been present in court during the hearing of this appeal, which so strongly interested him, or had he read this brief of counsel in his own case, he would have become aware of the significance of such proof. If he has attempted to prove a matter of this kind by a suspicious witness, the attempt must recoil upon him.

The story of the witness Rodgers (Rec. p. 126) is as follows: That on the 24th of July, 1900, he went over to the tax office and asked for the tax bills on the King's Palace branch (the premises in controversy). He went to the collector of taxes for a bill of the taxes that were due; it being his first bill that he had paid on taxes, he was anxious to know that he got a bill for everything that was due; he asked them if that was everything that was due and they told him yes. He took the bill to the store, and Harry King signed a check for it in the name of the firm, and the witness took it over and paid it and got a receipt. This check and receipted tax bill will be found in the record at pages 279 and 280, and have been already referred to. At page 127 the witness says that he went to the same office on the 21st day of May, 1901,

to get the bill for the taxes of 1901. He gave the following account as to what then occurred:

> "I went there on the 21st of May, 1901, to get the bill for the taxes of 1901, and the bill was handed to me. On the 24th of May, Mr. Harry King signed a check for that bill, and I took it over, and as three days had passed between the time I got the bill and the check he made out, I went and asked them, and said: 'Now look here; am I sure this is all right?' They said: 'Yes, sir; this is all right.' I said: 'This clears the taxes on this property.' 'Well,' he says, 'there seems to be some back taxes on it.' I said: 'That is very funny. I paid the taxes here a year ago, and they said the taxes were all paid, and I know there has nothing accrued since.' He says: 'We can't tell you what it is. You will have to go downstairs to find out.' I went downstairs and showed them this check and this bill. I said: 'It is very funny. I have been trying to keep these taxes up. You told me here a year ago there was nothing due on this property, and upstairs here, after I brought this check for 1901, they tell me there is something back of it. What is it?' I said: 'Give me a bill for whatever is due on the property, and I will get another check.' I didn't pay him that check on the first bill. I held it still. He handed me over then another bill, which covered the last half of 1898 on a little sublot there, and the whole of 1899 on that same sublot, and the whole of 1899 on lot A, amounting to nearly double the 1901 taxes. 'Well,' I said, 'this is very funny. Mr. King wants to keep these taxes paid up, and here you told me here a year ago, and again the other day, that there was nothing due; and here I find out a whole year has not been paid.' 'Well,' he says, 'I don't know how that occurred.' I went back to the office and showed this bill to Mr. King, and I said, 'You had better give me another check,' so he gave me another check, and I took the two checks over together and got the receipts for those bills."

It is most significant that these pregnant facts, said to have occurred in July, 1900, and May, 1901 (the bill was filed on December 4, 1901), and so recently as to be fresh in the memory of Harry King, were not mentioned in any form in the pleadings.

On page 283, "Exhibit Rodgers, No. 6," is a bill paid by Rodgers in May, 1901, which shows that the property had been sold on April 12, 1900, to C. M. Wiltsie, the same man who had bought the same premises in April, 1899, for the unpaid instalment of taxes for the latter half of the year 1898. So that the statement of the witness Rodgers on the second point, too, is on its face improbable in the highest degree. When his cross-examination is taken up, at page 130 of the record, beginning with the question towards the bottom of the page: "Q. Did you take the number of the lot and square with you?" down to the close of his first cross-examination by Mr. Johnston, at page 139, and when his statements in this cross-examination are compared with his testimony upon redirect examination by Mr. Tobriner, beginning at page 140 and ending at page 142, and when these are again compared with his second cross-examination by Mr. Perry, beginning at page 142 and extending to page 146, and by Mr. Johnston, beginning at page 147 and extending to page 152, it will be found that his contradictions are such as to utterly discredit him. Nor is this all. Certain statements of his admitted of positive contradiction.

The testimony of Miss Lidie Addison (Rec. p. 452) convicts him of untrue statements in several respects. Miss Addison testifies that at the time in question she was employed in the assessor's office of the District of Columbia. She identified the tax bill (Exhibit Rodgers, No. 2) found at page 279 of the record, being the bill paid by Rodgers on the 24th day of July, 1900, as being in her handwriting, her initials "L. A." being in one corner of

the paper, written there by herself. She further testified, in contradiction of Rodgers, not only that she had not made out this bill in advance and deposited it in a box on a table to be delivered when called for, but that she could not have done so under the course of business then obtaining in the office.

The then course of business of the office was such that she necessarily gave it to the person who asked for it. She thereby flatly contradicted the witness Rodgers in his testimony at page 150. She further testified that she had no personal or official knowledge with respect to the existence of arrears of taxes on this piece of property (Rec. p. 453); that she had a general knowledge that a good many pieces of property were in arrears, but no personal knowledge of their existence on that property. She further testified explicitly that she did not at the time of making out and delivering the bill in question state to Mr. Rodgers or anybody else that there were no arrears upon that property, or anything to that effect. She reiterated that she had no knowledge of arrears on that special piece of property which would have enabled her to give any information on the subject of arrears to anybody. She further testified that she had never been in the arrears division. Here, therefore, in addition to the overwhelming probability of the matter, is positive testimony to the effect that the witness, Rodgers, could not have gotten in July, 1900, any information whatever from the person from whom he got this bill as to whether there were arrears on the property or not. When he did ask for arrears in May, 1901, he got the information which is detailed at pages 278–285 of the record, and as has been said, it is incredible that when he got this information he did not also get the information of the tax sale made in April, 1899.

It must be borne in mind that the testimony of Miss Addison upon these points is conclusive. If she was

mistaken many witnesses in the tax office could have testified as to the course of business there. Not one of these was called to correct her statements.

Of course, Rodgers has not made these statements in his own interest, but in the interest and at the instance of Harry King.

The next thing that occurred was Wiltsie's letter of July 24, 1901 (Rec. p. 285), offering to sell to the complainant the tax title of April, 1899, irredeemable since April, 1901.

Then ensued the correspondence between Wiltsie and Harry King, which has already been printed in full in this brief (*supra*, pp. 77-83).

Let us pause at the day towards the last of September, when Knight informed Kann and Webb of the existence of this irredeemable tax sale.

It is conceded by the pleadings that none of the defendants had, down to that time, anything to do with the lessee's breach of covenant and its consequences. Whatever claim she makes beyond that rests upon the charge of fraud.

Accident, inadvertence, mistake, are what she relies upon up to this point.

What case has she made out from her testimony resting upon any one or more of these grounds?

What Sort of Accident or Mistake is it that a Court of Equity Relieves Against?

We are told in the first volume of Story's Equity Jurisprudence, section 78, as follows:

> "And first of accident. By the term 'accident' is here intended not merely inevitable casualty or the act of Providence, or what is technically *vis major* or an irresistible force; *but such unforeseen events, misfortunes, losses, acts or omissions, as are not the result of any negligence or misconduct of the party.*"

If we turn to the head of "*Mistake*," we find in the same authoritative work, section 146, the following statement:

> "It is not, however, sufficient in all cases to give the party relief that the fact is material, but it must be such as he could not by reasonable diligence get knowledge of when he was put upon inquiry. For *if, by such reasonable diligence, he could have obtained knowledge of the fact, equity will not relieve him, since that would be to encourage culpable negligence.*"

In the last (third) edition of Pomeroy on Equity Jurisprudence, the definition of "accident," in its legal acceptation, is as follows (sec. 823):

> "Accident is an unforeseen and unexpected event, occurring external to the party affected by it, *and of which his own agency is not the proximate cause*, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain. If the party's own agency is the proximate cause of the event, it is a mistake rather than an accident."

In section 828 the author says:

> "The jurisdiction will not be exercised on behalf of a party when the accident is the result of his own culpable negligence or fault."

Again, at section 452, the author says:

> "In a case where an agreement creates a mere pecuniary obligation, so that a forfeiture incurred by its breach would ordinarily be set aside, a court of equity will refuse to aid a defaulting party, and relieve against a forfeiture, if his violation of the contract was the result of gross negligence, or was wilful and persistent."

In support of the text the author refers to the case of *Parsons* v. *Smillie*, 97 Cal. 647, holding that "'wilful' forfeiture simply means one voluntarily incurred." In this note the author criticises the case of *South Penn Oil Co.* v. *Edgell*, 48 W. Va. 348, hereinbefore commented upon, and says:

> "The case" (referring to the case under discussion) "seems hardly in accord with the general rule as laid down in the text."

On the subject of "mistake," the same author says (section 856):

> "As a second requisite, it has sometimes been said in very general terms that a mistake resulting from the complaining party's own negligence will never be relieved. This proposition is not sustained by the authorities. It would be more accurate to say that where the mistake is wholly caused by the want of that care and diligence in the transaction which should be used by every person of reasonable prudence, and the absence of which would be a violation of legal duty, a court of equity will not interpose its relief; but even with this more guarded mode of statement, each instance of negligence must depend, to a great extent, upon its own circumstances. It is not every negligence that will stay the hand of the court. The conclusion from the best authorities seems to be, that the neglect must amount to the violation of a positive legal duty."

The leading English case upon this subject is that of the *Duke of Beaufort* v. *Neeld et al.*, 12 Cl. & F. 248. The circumstances of this case were these: A certain act of Parliament authorized exchanges of land, upon conditions therein prescribed, among which conditions was the written consent of the owners of the lands intended to be exchanged. The landowners of a parish determined to

carry this act into execution, and appointed a commissioner for that purpose. The Duke of Beaufort, one of the landowners, authorized his agent to attend for him at the meetings held for the purpose of carrying the act into execution, but desired him not to exchange a particular wood except for woodland. Neeld's lands were to be exchanged against those of the Duke, and this restriction was communicated to Neeld's agent, who, being asked to exchange another wood against the wood in question, said that his principal had no power to do so. This answer was communicated to the Duke, who took no further notice of the matter. The restriction on the authority of the Duke's agent did not appear to have been brought to the knowledge of the commissioner. The commissioner prepared and the Duke signed a written consent to ratify the exchange of certain closes belonging to him, and designated in the consent by numbers. Among the closes thus designated was the wood in question; but the number by which it was referred to in the consent and in a map and plan previously submitted to the Duke's inspection was not the same as that which it bore in the Duke's private map of his own estate. A comparison of the two maps, or the reading of the plan sent with the commissioner's map, would have shown the Duke that the wood in question was included in his consent. The commissioner allotted the lands to be exchanged, and among them included this wood, but did not give woodland for it. Possession of the exchanged lands and of this wood (although the award of the commissioner had not been formally executed) was delivered by the Duke's agent to Neeld, who immediately began to exercise acts of ownership over it. The Duke some time afterwards discovered what had been done, and brought ejectment against Neeld for the wood. Neeld filed his bill in chancery to restrain the Duke from proceeding with the action, and to compel him to perfect the

exchange; and the Duke filed his bill to prevent the commissioner from executing the award, alleging that the consent given to him had been signed in mistake.

During the argument, counsel for the Duke said:

> "The appellant was deceived here. He did not know that this property was comprised in the proposed exchange. It may be true that the agent knew it, but then he had a restricted authority which bound him not to exchange Dunley Gorse, except on the terms of wood for wood. The appellant signed the supposed contract in mistake, and it is a principle of equity that a mistake will vitiate a contract, and that, under such circumstances, the suffering party shall be relieved."

Lord Brougham interrupted and said:

"But equity has not relieved against gross improvidence."

The Lord Chancellor (Lyndhurst), in delivering the opinion, said:

> "But I think it was the Duke's business to have made inquiry. He ought to have inquired of Mr. Watkins, his solicitor, if he wished to ascertain the fact. He ought to have made inquiry as to what those numbers meant, and what the lands were which were intended to be given in exchange; or, if Mr. Watkins was not in a condition to inform him, which probably he was not, he might have made inquiry of Mr. Wedge, his agent in the country. A delay of a day or two might have been occasioned by making these inquiries, but if he did not choose to make them—if he did not choose to exercise due caution in that respect—he can not turn around and say, 'I really did not know the contents of the paper when I signed it. I signed it incautiously.' He can not now with propriety say that, so as to free himself from the effects and consequences of his own act.
>
> . . . . . .

(P. 274):

> "Then when we come to the ratification, what is the effect of the ratification? If the Duke does not choose to make inquiry—if he does not choose to exercise ordinary caution, but puts his signature to the instrument, giving authority to the commissioner to proceed in his name and act upon his interests; and if the commissioner acts upon that authority, and other parties deal with the commissioner, and the exchanges go on and are completed—it appears to me rather a strong proposition to say, that the Duke is not bound by the act of the commissioner, that act being founded upon his written consent, under the circumstances which I have stated. . . . If the Duke himself has incautiously signed the instrument to which I have referred, is the party dealing with the Duke to suffer, or the Duke, who has himself compromised his own interest by his incautious proceedings? Undoubtedly the Duke."

Lord Brougham said (p. 282):

> "Now, either the contents of that paper may have been hastily and inaccurately considered by him" (the Duke), "or he may not have looked at them and considered them at all, or in looking at them, he may have found, as is alleged, and as my noble and learned friend has already adverted to, that neither Dunley Gorse nor any other close was named, but that all the closes were referred to by numbers, which numbers referred to a plan. That is all very true, but, still, before a person signs his name to an instrument, he is bound to look. He need not look if he does not choose, but then if he does not look, he must bear the penalty of being held to have looked; and if he either shuts his eyes, or carelessly sees, he shall not be allowed in a court of law or equity to say, 'It is a mistake—I never knew it,' because he might have known it, and he ought to have known

it; and if he signs his name, and could have looked, and did not look still he is bound by his act."

Lord Campbell said (p. 285):

"But then we come to the consent, which was signed by the Duke's own hand; and at that time again I believe what the Duke says, that he was ignorant of what he was doing. Because he is a man of unblemished honor, I have no doubt that everything he says is strictly and correctly true. But he has the means of knowing; he wilfully shuts his eyes (I do not say that offensively at all), with the means of knowledge within his power; and it being his duty to have ascertained the fact, can he be heard to say, 'I was ignorant; relieve me from the effects of the mistake which I have made'?

"The learned counsel for the appellant cited a great many cases, which are perfectly well decided, to show that, where the interposition of a Court of Equity is asked against a man who has fallen into a mistake, it will not interpose. There may be certain cases in which equity will not consider him bound by that which he has done under a mistake. But, notwithstanding Mr. Turner's great learning, industry, and research, he could point out no case in which a Court of Equity had been successfully asked to interpose in favor of a man who wilfully was ignorant of that which he ought to have known—a man who, without exercising that diligence which the law would expect of a reasonable and careful person, committed a mistake, in consequence of which alone the proceedings in court have arisen. No such case is to be found; *and it would be a reproach to the law if there could have been such a decision.*"

In the case of *Barrows* v. *Isaacs*, decided by the Court of Appeals, 1 Q. B. D. (1891), 417, the lessee covenanted not to underlet without consent of the lessor, which

consent the lessor agreed should not be arbitrarily withheld in case of a sublease proposed to a responsible party. The lease provided for power to reenter for breach. The lessee underlet part of the premises to a responsible party, but, on account of the neglect of his solicitor to look at the original lease, the consent of the lessor was not obtained. The court held that the omission was not a mistake for which a court of equity would grant equitable relief against forfeiture; nor was there fraud or accident within the meaning of those terms as construed by a court of equity in granting relief. Beginning at page 425, Kay, L. J., discusses the subject at length, and in view of the importance of his decision, we quote so much of it as concerns the point under discussion:

> "It has been argued (1) that this was a mistake which enables equity to relieve against the forfeiture; (2) that it would be a proper exercise of that discretionary jurisdiction to do so in this case, as no damage has been done to the plaintiff by the underlease. I do not desire to cast the least doubt upon the jurisdiction of the court to relieve in cases of what it calls mistake; what we have to determine is whether such relief would be a proper exercise of that jurisdiction in this case. Long ago courts of equity assumed jurisdiction to relieve against forfeitures and penalties where the only object was to secure payment of a definite sum of money, even though there was no fraud, accident, surprise, or mistake. On this principle it relieved against the payment of the whole penalty on a money bond before the statutes 4 & 5 Anne, c. 16, ss. 12 and 13, and 8 & 9 Wm. 3, c. 11, which enabled courts of law to give the same relief. Also against forfeiture for non-payment of rent, and by statute 4 Geo. 2, c. 28, its powers in this respect were somewhat restricted by limiting the time for their exercise to six months after execution in ejectment. At first there seems to have

been some hesitation as to whether this relief might not be extended to other cases of forfeiture for breach of covenants, such as to repair, to insure, and the like, where compensation could be made; but it was soon recognized that there would be great difficulty in estimating the proper amount of compensation; and, since the decision of Lord Eldon in *Hill* v. *Barclay*, it has always been held that equity would not relieve, merely on the ground that it could give compensation, upon breach of any covenant in a lease except the covenant for payment of rent. But of course this left unaffected the undoubted jurisdiction to relieve in case of breach occasioned by fraud, accident, surprise, or mistake. At present the only one of these we have to deal with is mistake; and the questions are, (1) whether the facts I have described amount to mistake; and, if so, (2) whether in its discretion the court will relieve. Very wisely, as I presume to think, the courts have abstained from giving any general definition of what amounts to mistake. It is an easily arguable question whether mere forgetfulness of such a covenant—even if not negligent—can properly be called mistake. The case of *Kelly* v. *Solari*, however, and the observation of Lord Blackburn in the House of Lords in *Brownlie* v. *Campbell*, establish that, in an action to recover money paid by mistake, it is sufficient to prove that at the time of the payment the person paying was actually ignorant that the money was not due, although he had the means of knowledge, and it was owing to his own carelessness or forgetfulness that he was in fact ignorant. There undoubtedly forgetfulness of the previous payment is treated as mistake. But in those cases the payee is in possession of money which he had no right to receive, and which really belongs to the person who paid it, and no amount of carelessness on his part can justify the payee in retaining it. I feel great difficulty in saying that if this be mistake at law it would not be considered mistake in equity. It is an entirely different question

whether on the ground of such a mistake equity, in the exercise of its discretionary jurisdiction, would relieve a man from a forfeiture incurred by his own gross carelessness. *Vigilantibus, non dormientibus, leges subveniunt.* Equity is bound to consider all the circumstances of each case. To a suitor asking to be relieved from forfeiture, the result of carelessness so gross that it might almost be called wilful, it can hardly be favorably disposed. I have spoken of the right of reentry of a landlord as a 'forfeiture' of the lease, but the use of the word 'forfeiture,' in cases of this kind is somewhat misleading. This is not like a condition in a will, non-compliance with which causes a forfeiture. It is a contract between landlord and tenant that if the latter does, or omits to do, certain specific acts, then the landlord may reenter. Lord Eldon, in *Hill* v. *Barclay*, dealing with Lord Erskine's observations as to relieving against breach of covenant to repair, said: 'A particular case might perhaps occur, such as are put by Lord Erskine in *Sanders* v. *Pope*, in which it would be demonstrable that the landlord would sustain no injury by the relief; but it is taking a prodigious liberty with a contract by which a tenant has undertaken forthwith to repair.' I understand that to mean that it is a very strong proceeding for equity to interfere with the contract of the parties that the landlord may reenter for breach of covenant, in that it can only do so in very exceptional circumstances. In *Earl Beauchamp* v. *Winn*, the Court of Chancery has refused to rescind an agreement which it was sought to set aside on the ground of mistake common to both parties. The mistake alleged on the part of the Earl was that he thought he had merely a right over the surface of a certain common, called East Common, instead of being owner of the soil as he really was. This depended upon the doubtful construction of an ancient grant in 1799, which was among his title deeds, but which the Lord Chancellor was of opinion he was not guilty of any negligence in not having consulted. The Lord

Chancellor said (p. 230): 'This is not a case of mistake, therefore, but of ignorance, and ignorance resulting from a party's own omission to avail himself of information within his power.' At page 233 he says: 'The cases in which equity interferes to set aside contracts are those in which either there has been mutual mistake or ignorance in both parties affecting the essence of the contract, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party.' At page 235 the Lord Chancellor adds that if the Earl had mistaken his right to the East Common, and that he was in law the owner of the soil, instead of having merely a right over the surface, there was jurisdiction in equity to set aside the agreement. The House came to the conclusion that there was not any mistake, and affirmed the decision. The Lord Chancellor's former words, as to the ignorance not being mistake, are probably a statement of the argument which had been addressed to the House rather than his own opinion. However, he carefully excepts the case of ignorance arising from negligence of the person who seeks relief. In the well-known case of *Duke of Beaufort* v. *Neeld* an exchange was made of lands under the Inclosure Act, 6 & 7 Wm. 4, c. 115, s. 35, of which act requires the consent in writing of the proprietor. The Duke of Beaufort signed a written consent. The commissioner directed the exchange, and Neeld entered upon the lands exchanged. The Duke sent a written notice to the commissioner, declaring that his consent had been signed under a misapprehension. The Duke then brought an action of trespass and ejectment, in which judgment was given against him. He then filed a bill to rescind the written consent. During the argument Lord Brougham said, 'equity has not relieved against gross improvidence.' Lord Lyndhurst, L. C., in giving judgment, said that the Duke stated that, when he signed the consent, he did not know that the piece of land in question was included in it, because it was mentioned, not by name, but by a

number which referred to a map not then in his possession. But he says it was his duty to make inquiry, and, 'if he did not choose to exercise due caution in that respect, he can not turn round and say, "I really did not know the contents of the paper when I signed it; I signed it incautiously." He can not now with propriety say that so as to free himself from the consequences of his own act.' Lord Brougham said: 'He need not look if he does not choose; but then, if he does not look, he must bear the penalty of being held to have looked, and if he either shuts his eyes or carelessly sees, he shall not be allowed in a court of law or equity to say, "It is a mistake; I never knew it," because he might have known it, and he ought to have known it, and if he signs his name, and could have looked, and did not look, still he is bound by his act.' Lord Campbell, in the same case, said: 'But then we come to the consent which was signed by the Duke's own hand, and at that time I believe what the Duke says, that he was ignorant of what he was doing. Because he is a man of unblemished honor, I have no doubt that everything he says is strictly and correctly true. But he has the means of knowing; and he wilfully shuts his eyes (I do not say that offensively at all), with the means of knowledge within his power, and it being his duty to have ascertained the fact, can he be heard to say, "I was ignorant; relieve me from the effects of the mistake which I have made"?' The equitable relief sought in that case was refused partly on this ground. It is a decision of the highest tribunal that equity will not relieve when the mistake arises from the negligence of the suitor who seeks its help.

"I am clearly of opinion that Messrs. Isaacs must be held responsible for any negligence of Mr. Sydney. Their plea for relief therefrom, explicitly stated, would run thus: 'We admit that we were aware of the necessity of obtaining the plaintiff's consent before making the underlease. The lease to us which imposed that obligation was in our possession. We had forgotten the provisions

of it. The ordinary course of business required that we should examine the lease before granting the underlease. We admit that we neglected to do so, but we say that no harm has been done to the plaintiff, and, therefore, equity should relieve against the forfeiture.' There must have been thousands of cases in which leases have been forfeited owing to non-performance of covenants through bona fide forgetfulness. Counsel have not cited to us, nor have I been able to find, a single instance in which relief has been given under such circumstances. *It is impossible not to see that such relief would be an incentive to negligence. If we were to grant it, hereafter lessees might avoid looking at their leases, lest they should be reminded by them of obligations which it would be more convenient to ignore.* Many suits would be instituted for relief upon this ground, which, until now, is unknown in the records of the court as one upon which relief would be granted. The course of legislation upon this subject of forfeiture of leases by breach of contract is most significant. At first, as I have pointed out, the remedial jurisdiction of equity against penalties was extended to courts of common law. Next, the relief it gave in cases of forfeiture for non-payment of rent was limited in time. Then ensued a long period in which equity seems to have refused relief in cases of breach of any of the other covenants in a lease. Very hard cases occurred, in which unconscionable landlords insisted on their legal rights. Especially hard were these forfeitures for breach of the covenant to insure when no damage had ensued. By 22 and 23 Viet. c. 35, ss. 4–9—extended to courts of common law by 23 and 24 Viet. c. 126—it was enacted that 'a Court of Equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire where no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insur-

ance on foot at the time of the application to the court, in conformity with the covenant to insure, upon such terms as to the court may seem fit.' The terms of that enactment, making it lawful to give this relief when the breach has been committed 'through accident or mistake, or otherwise without fraud or gross negligence' show plainly that equity had not been accustomed to relieve in such cases on the ground of accident or mistake, and, further, they provide that relief shall not be given, even in cases of accident or mistake, when there has been gross negligence. Now, by the conveyancing act, 1881, these enactments are repealed; but a *locus penitentiae* is given to the lessee by requiring, in case of any breach of covenant, that the lessor shall serve upon him a notice specifying the breach and requiring him to remedy it, and to make compensation in money, before exercising his right of reentry; otherwise the high court may grant relief upon proper terms. But it is expressly provided that this does not extend to a covenant against assigning, underletting, parting with the possession or disposing of the land leased. Forfeiture for breach of this covenant is left to be dealt with according to the ordinary law and practice of courts of equity.

"Upon the whole, therefore, assuming, what I do not think it necessary to affirm or deny, that the high court had jurisdiction to relieve in this case, if in its discretion it thought fit to do so, for the reasons I have given I am of opinion that to grant such relief would not be a proper exercise of that discretion, and, accordingly, I think that this appeal should be dismissed with costs."

The case of *Eastern Telegraph Co.* v. *Dent*, 1 Q. B. D. (1899) 835, which was a case in the Court of Appeal, was this: In a lease for years, the lessees covenanted not to underlet, assign, or part with the possession of the premises, or any part thereof, without the consent in writing of the lessors, such consent not to be unreasonably withheld. The lease contained a power to reenter

upon breach of any of the covenants. The lessees, without asking the consent of the lessors, underlet a part of the premises to a tenant who already occupied under the lessors, and to whom no objection could have been reasonably taken. In an action by the lessors to recover possession of the premises for breach of covenant, it was held that the fact that the breach of covenant had been committed through forgetfulness, or because the lessees thought it unimportant, did not form a ground for giving them equitable relief against forfeiture for breach of the covenant, and that the plaintiffs were entitled to succeed in the action. The case of *Barrows* v. *Isaacs* (*supra*) was followed, and the case of *Hyde* v. *Warden* (1877, 3d Ex. D., 72) was questioned.

In delivering the unanimous opinion of the court, Smith, L. J., said, referring to the case of *Hyde* v. *Warden:*

> "If this judgment is in conflict with the subsequent case of *Barrow* v. *Isaacs*, I certainly agree with the decision in the last-named case. It covers the case now before us; and, apart from it, *I could not bring myself to say that a judge could run his pen through that part of the contract, which is that consent should be asked for, and render it of no effect.*"

Collins, L. J., said (p. 838):

> "*Hard cases must not be allowed to make bad law.* . . . If there is a conflict of authority, and I am to decide this case on first principles, it seems to me to be clear that there was a breach, and I can see nothing which the defendants can set up in a court of law or equity in answer."

Romer, L. J., said (p. 839):

> "I think it is quite clear that there was a breach. The proviso to the covenant has no application to this case, for it can not be said that the lessors unreasonably withheld their consent

> to a subletting, because no consent was asked for. Under these circumstances the lessors have a legal right under the contract which they can enforce by coming to the court. Then it is said there is some right to equitable relief on the ground that the lessees made a mistake in not asking the consent of their lessors. There are some cases in which equity will interfere on the ground of mistake—generally cases of mutual mistake, but occasionally cases of unilateral mistake. The suggestion that it is a ground for relief in equity, against the enforcement by the landlord of his legal right, that the tenant has committed the breach of covenant either through thoughtlessness or because he thought the breach unimportant, has no foundation in principle or authority."

Upon the argument below counsel endeavored with great skill to distinguish these cases from that at bar. The argument of counsel in this respect, however skilful, is a mere attempt to cloud by words that which is perfectly clear. The contracting parties in the case at bar, as in the two cases last cited, had entered into obligations and acquired rights in good faith. In those cases, as in the case at bar, a breach of covenant was made, and the guilty party applied for relief against the consequent forfeiture. It was not suggested by counsel who argued for the forfeiture that harm had resulted in point of fact from the breaches in those cases. It was strongly urged that it was inequitable to enforce a forfeiture under such circumstances. The judges, however, unanimously held that they could not, without violating contract rights, which they had no jurisdiction to do, run their pen through a covenant made by the parties and a condition of breach affixed thereto because a sentimental reason was urged for such proceeding. They could not forfeit a man's right to his contract at the instance of a man who had, by contract, himself forfeited his right.

It is true that these cases do not deny the jurisdiction of a court of equity to relieve in a proper case of mistake; nor do they attempt to make such denial. To so construe them is contradictory of their plain language. But they do unequivocally decide that negligence or forgetfulness is not mistake. Nor does it aid counsel for the appellee to introduce the subject of unilateral mistake. The case at bar is of that description. It is not pretended that the lessor was under any mistake in the premises. The closer the cases quoted are studied, the more they will be seen to be on all fours with the case at bar in so far as the principle involved is concerned.

Coming now to the American decisions, we refer first to the leading case of *Grimes* v. *Sanders et al.*, 93 U. S., p. 55, decided by this court in the year 1876. Mr. Justice Swayne delivered the unanimous opinion of the court. This was a case of a bill in equity filed for relief from the consequences of what was said to be a mistake. The appellant, Grimes, owned two tracts of land, the larger of which was regarded as valuable on account of the gold supposed to be upon it. The two tracts were separated by intervening gold-bearing lands which the appellant had sold to others. Authority was given by Grimes to an agent to sell the two tracts in question. The agent acted upon this authority, and a conveyance to the purchaser was prepared. Opportunity was given to the purchaser for an examination of the tracts, which examination was made, and the ground was paid for. This was in the month of March, 1866. In September of the same year the purchaser alleged that there had been a mistake as to the land actually bought, and that he supposed he was buying other land. On the 21st of March, 1868, the purchaser filed a bill for relief on the ground of mistake. The court below sustained the bill, whereupon Grimes, the owner, appealed to the Supreme Court of

the United States. Mr. Justice Swayne delivered the unanimous opinion of the court, and said (p. 61):

> "Mistake, to be available in equity, must not have arisen from negligence, where the means of knowledge were easily accessible. The party complaining must have exercised at least the degree of diligence 'which may be fairly expected from a reasonable person.' Kerr on Fraud and Mistake, 407.
>
> "Fisher, the agent of the appellees, who had the deed prepared, was within a few hours' travel of the land when the deed was executed. He knew the grantor had sold contiguous lands upon which veins of gold had been found, and that the course and direction of those veins were important to the premises in question. He could easily have taken measures to see and verify the boundary lines on the ground. He did nothing of the kind. The appellees paid their money without even inquiring of any one professing to know where the lines were. The courses and distances specified in the deed show that a surveyor had been employed. Why was he not called upon? The appellants sat quietly in the dark, until the mistake was developed by the light of subsequent events. Full knowledge was within their reach all the time, from the beginning of the negotiation until the transaction was closed. It was their own fault that they did not avail themselves of it. In *Manser* v. *Davis*, 6 Ves. 678, the complainant, being desirous to become a freeholder in Essex, bought a house which he supposed to be in that county. It proved to be in Kent. He was compelled in equity to complete the purchase. The mistake there, as here, was the result of the want of proper diligence. See, also, *Seton* v. *Slade*, 7 Ves. 269; *2 Kent's Com.* 485; *1 Story's Eq.*, sects. 146, 147; *Atwood* v. *Small*, 6 Cl. & Fin. 338; *Jennings* v. *Broughton*, 17 Beav. 141; *Campbell* v. *Ingilby*, 1 De G. & J. 405; *Garrett* v. *Burleson*, 25 Tex. 44; *Warner* v. *Daniels* et al., 1 Woodb. & M. 91;

Ferson v. *Sanger*, id. 139; *Lamb* v. *Harris*, 8 Ga. 546; *Trigg* v. *Read*, 5 Humph. 529; *Haywood* v. *Cope*, 25 Beav. 143."

In addition to the authorities cited at the conclusion of the foregoing opinion, counsel refer to the following:

In the case of *Kinney* v. *The Con. Va. Mining Co.*, 4 Sawyer, 382, the case of *Grimes* v. *Sanders* is cited and followed, and the language of the opinion is quoted.

In the case of *Hunt* v. *Hardwick & Co.*, 68 Ga. 100, which was an application to a court of equity for relief against the purchase of a stock of goods on the ground of mistake, the court say (p. 104):

> "So, a mistake or fraud from which a party seeks relief must not have arisen from negligence, or a blind and unsuspecting confidence, where the means of knowledge were easily accessible. The party complaining must have exercised at least that degree of diligence which may be fairly expected from a reasonable person."

Reference is also made to the case of *The Township of Churchill* v. *The Township of Cummings*, 51 Mich. 446, 451; and to the case of *Persinger* v. *Chapman*, 93 Va. 349, 352.

Without repeating, but again referring to the American cases cited and discussed (*supra*, pp. 33 to 35), a renewed consideration of the American cases cited by the appellee below will be had, confining such consideration entirely to the question of relief given by such courts upon the ground of accident or mistake.

The case of *Sanborn* v. *Woodman et al.*, 5 Cushing, 36, did not at all touch the jurisdiction in question here. The court say (p. 41):

> "And there is clearly no distinction in principle, or in the authorities, between a forfeiture for the non-payment of rent, and the forfeiture in the present case for the non-payment of interest."

The case of *Hancock, Administrator*, v. *Carlton*, 6 Gray, 39, was one in which relief was refused on the ground of laches. The report of the commissioner, which was confirmed by the court, says, at p. 56:

> "But inasmuch as, in equity, the non-payment of money at the precise time fixed may be sometimes explained and excused by circumstances of accident or mistake, the plea was not held absolutely sufficient if any such circumstances should appear, upon the proof of the plea, to show that such non-compliance with the condition of the deed, by the payment of the interest or principal of either of the mortgages mentioned in the said condition, could be explained or excused."

Thereupon the commissioner proceeds to set out the evidence adduced to prove these circumstances of accident or mistake. He says (p. 57):

> "Both Clark and Hancock had constructive notice of the existence of said mortgages, the persons to whom they were due, the amount due, and the times therein respectively fixed for the payment of interest and principal, because they were enumerated in the deed under which they claimed. It was further proved that Hancock, in his lifetime, had actual notice that some of these mortgages had become due, and were unpaid, and that Carlton relied on the condition of his deed for their payment; but no step was taken by him in his lifetime. . . .
>
> "The ground relied on to take this case out of the direct operation of the condition, on the ground that, in equity, performance at the day was not necessary, was a mistake of the law by Hancock, namely, that he took the deed of Clark under a mistaken belief that, in law, such a condition, being substantially a condition for securing the payment of money, though contained in the condition of a deed from grantor to grantee, in favor of the grantor, was yet a security, in the nature of a mortgage, and that he would have the

term of three years, from the time of condition broken, to redeem. . . .

(P. 58):

"But I was of opinion that this mistaken opinion, in regard to the nature and character of his own title, if it existed, being an opinion of his own rights, which was strongly pressed upon the consideration of the court in the former argument upon the sufficiency of the plea, was not such a mistake as could be relieved against in equity. It was not an accident or mistake caused, or in any way promoted, by the defendant. He took an invalid title; he has contended for the correctness of it to the end, and it has been decided against him. The defendant can not be restored to his legal rights by any payment of money which can now be made."

The case of *Mactier* v. *Osborn*, 146 Mass. 399, was, as has been said, a case in which the opinion was based upon the overruled case of *Sanders* v. *Pope*. The court say (p. 402):

"In the case at bar, where the former policies, which were satisfactory to the lessors, expired, the lessee in good faith intended to have them renewed in the same amounts and form. By accident, or by a mistake of the insurance brokers, they were renewed in a form which does not fairly meet the requirements of the covenant. This was not wilful or voluntary on her part. *It was not an accidental forgetfulness to renew the policies.* The property has been all the time fully insured. It was an occurrence not anticipated by her and not known to her until after the demandant entered to enforce a forfeiture. No misconduct or culpable fault can be attributed to her. The lessors have not in fact been injured by the accident and can now be put *in statu quo.* It is against equity and good conscience that the demandant should insist upon a forfeiture of a valuable leasehold estate."

This case is really in favor of the appellant. So, also, is the case of *Lundin* v. *Schoeffel et al.*, 167 Mass. 465. This case has already been sufficiently commented upon (*supra*, p. 36). It may be well, however, to add these words of the court. In referring to the preceding case of *Mactier* v. *Osborn*, the court say:

> "The precise question now before us did not arise in that case. The omission in this case is not of the same character as a failure to repair when waste is going on, or to insure. It is merely a failure to pay out money, and is much like an omission to pay taxes, which, in the absence of bad faith, and where the position of the parties has not been changed, and no new rights have intervened, has been held not to bar the lessee from relief. *Giles* v. *Austin*, 62 N. Y. 486; *Noyes* v. *Anderson*, 124 N. Y. 175."

The reasoning of this case is really in favor of the appellant. The *obiter dictum* reference to taxes is one ill considered, the attention of the court not having been drawn to the dangerous character of an omission to pay taxes. The *obiter dictum*, however, has no application in the case at bar, since the limitations to the general statement have all occurred in this case. So far as the Massachusetts cases are concerned, their reasoning is in favor of the appellant and not of the appellee.

Coming to the New York cases, they all rest upon the principal case of *Garner* v. *Hannah*, 6 Duer, 262. In that case breach had been made in the payment of both general and special taxes, and in consequence thereof there had been tax sales, which were redeemed by the lessee. From the statement of the case at pp. 262–265, it does not appear that the lessee relied upon any special facts to excuse his breach. The case is, therefore, to be taken from the language used in the opinion of the court at p. 274, as a broad assertion that the covenant to pay taxes is identical in legal effect with the covenant to

pay rent, and that the court will relieve without any reference to fraud, accident, or mistake in the case of failure to pay taxes, as it undoubtedly does in the case of failure to pay rent. Such a decision cannot be supported in reason, nor by any well-considered authority.

In the case of *Giles* v. *Austin*, 62 N. Y. 486, the broad doctrine of *Garner* v. *Hannah* is affirmed, without reference to the equitable jurisdiction which we are discussing here.

In the case of *Noyes* v. *Anderson*, 124 N. Y. 175, this doctrine is reasserted. The opinion of the court (p. 179) goes upon the power of a court of equity to relieve a party against forfeitures and from penalties. It is said:

> "This relief will not be afforded in cases where the default and forfeiture have been occasioned by the wilful neglect of the party seeking it."

The special circumstances upon which relief was granted are thus stated (p. 182):

> "The trial court found that the previous nonpayment of it (the tax) was owing solely to the negligence of the defendant's son, and agent, Henry S. Anderson. The facts bearing upon that subject are undisputed. There is nothing in the evidence to permit the inference that the defendant did not intend to promptly pay all taxes and assessments on the property. She left that matter in charge of her son, who resided in the city, and she was away from there. He paid the taxes in 1886, and had in his hands the defendant's money with which to pay such charges, and sufficient to pay the assessment during the time it remained unpaid, and the only reason of his failure to pay it was that he did not know that it was made or existed. It appears that he might have ascertained about it at the office of the clerk of arrears. But when he paid the tax of 1886, at the tax office in the city, the son was, upon his inquiry, informed

by some one in the office that there was no sum due or in arrears against the property.

"It is clear that the purpose of the defendant's son was to pay the taxes and assessments, and that his failure to make an earlier payment in this instance was not wilful neglect on his part, nor was the plaintiff prejudiced by it."

Of these New York cases generally it is to be said that against reason and against English and American authority they ignore the distinction between the failure to pay rent and the failure to pay taxes. They determine that a failure to pay taxes is to be relieved in all cases in which a failure to pay rent is relieved. This entirely gets rid of the doctrine of relief on the ground of accident or mistake, and merely asks the question whether or not the suitor, applying to a court of equity for relief, has been guilty of such wilful negligence as would bar him in any case in such court.

The case of *McClarty* v. *Gokey*, 31 Iowa, 506, does not at all touch the jurisdiction which we are now considering.

The case of *South Penn Oil Co.* v. *Edgell*, 48 W. Va. 348, is the one that is criticised in Pomeroy's treatise, and was decided, as has been already said, upon its special circumstances. The reasoning of the court, at p. 351, is all directed towards the broad proposition of *Garner* v. *Hannah* (*supra*), which it adopts. The statement in the opinion, at p. 350, as follows, "the breach in this case came from a negligent mistake, but it was not wilful in a legal sense. To be so it must be knowingly committed," is against the whole weight of authority.

The case of *Tibbetts* v. *Cate*, 66 N. H. 550, is not reasoned, and is a reassertion of the doctrine of *Garner* v. *Hannah*. The court state, at p. 552, the facts as follows:

"The facts are found, that the plaintiff's refusal

> to pay the taxes when called upon was in consequence of her ignorance of her rights and duties in the matter; that she was ignorant of the ways of doing business; that she understood that the tax bill ought to be made out in her name, and that if she paid the taxes she was entitled to a receipted tax bill made out in her name, and that she believed she was entitled to a deed of her interest in the premises, and applied to the defendant for such a deed. It appears that she offered to pay the taxes for 1888 to the collector if he would give her a tax receipt in her own name, and that she requested the selectmen to tax the land to her in 1889.
>
> "Under these circumstances the refusal of the plaintiff to pay the taxes of 1888 and 1889 was not in any true sense wilful, and she is entitled to the relief prayed for."

It is a satisfaction to those who know the reputation of Jeremiah Smith, Esq., late a justice of the Supreme Court of New Hampshire, that he did not sit in this case. The broad doctrine that ignorance of the law is an excuse for violating a covenant would seem to be declared in the New Hampshire case.

The case of *Kopper* v. *Dyer*, 59 Vt. 477, is the only one of the cases cited in which there is any attempt to adequately review the authorities. The decision quotes as authority the overruled case of *Sanders* v. *Pope*, and other English authorities which are overruled by later decisions hereinbefore referred to. The American cases cited in support of the opinion (p. 484) are all cases in which some unusual circumstances, entirely external to the party applying for relief, happened to prevent him from doing a thing which he had made all reasonable preparations to do. Relief was granted to the plaintiff in the case because of the special facts set forth at page 487 of the opinion, which show the preparation that he

had made to discharge his contract. At page 488 the court, after reciting these facts, say:

> "On these facts, and the others disclosed by the record, Kopper can not justly be charged with negligence. The means he had taken to obtain the money rendered it reasonably certain that he would succeed, and that he was anxious to obtain it abundantly appears. That he did not meet Martin at eleven nor at two, was an unforeseen and an unexpected occurrence, external to himself, of which his agency was not the proximate nor even the remote cause, and thereby he was prevented from sending his money seasonably in a form that would have been treated as payment, whereby, contrary to his own intention and wish, he lost his legal right to pay, and Dyer acquired a legal right not to have him pay; and in these circumstances, Kopper is entitled to relief that will reinstate him in his former position, on terms that he satisfy the equitable rights of the other party."

The case of *Eichenlaub et al.* v. *Neill*, 3 Ohio Dec., p. 365, has already been referred to. It is a decision of the Circuit Court of Ohio for Franklin County, and was pronounced by Shearer, Summers, and Allread, JJ. It is a decision which contains a more careful review of the authorities than many of those which are cited of higher courts. The covenant whose breach had brought about the forfeiture sought to be relieved was a peculiar one, in that it provided that certain taxes which were covenanted to be paid should constitute a further rent for the premises demised. The opinion considers, in the first place, the necessity for a demand, and, after reviewing the authorities upon which the appellee's counsel relies in this connection, holds as follows:

> "A demand being necessary to forfeiture for non-payment of rent, we think it should be also for non-payment of taxes; but we are not satisfied that such is the law. The cases above referred to

> do not seem to be well considered; the statements are in the nature of *dicta;* no authorities are cited, and they cannot be held to settle the question; nor do we think it necessary to pass upon it. The plaintiffs file their petition asking to be relieved from the forfeiture, and the matter we are to determine is whether they have made out a case entitling them to relief."

The court then proceed to consider certain of the English cases hereinbefore cited, and come to the conclusion that—

> "wherever a penalty or forfeiture is inserted merely to secure the payment of money or the performance of some act or the enjoyment of some right or benefit, equity regards such payments, performance, or enjoyment as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and will, therefore, relieve the debtor party from such penalty or forfeiture whenever the actual damages by the creditor party can be adequately compensated."

The court then proceed to consider the equity jurisdiction of surprise, accident, etc., and upon this subject say as follows:

> "Counsel discuss the questions of surprise, unavoidable accident, conduct on the part of the lessor tending to mislead. These do not lie at the foundation of the doctrine. Mr. Pomeroy, in a note to the last above section, says:
>
> "The doctrine of equitable interference to relieve against penalties and forfeitures has been described and discussed by some writers as a branch of the jurisdiction in cases of accident. In very ancient times, when the powers of the court of chancery were restricted by the language of the royal decree to certain specified heads, as good faith, fraud, mistake, and accident, and it was necessary that every new exercise of power should

> be referred to some one of these heads, it may have been implied that the jurisdiction over penalties belonged to the head of accident, but it is evident that this is not the true source of the jurisdiction. There can be no pretense of any accident in the execution of agreements containing penalties. The doctrine has a deeper foundation in universal principles of right, as shown in the preceding chapter.'"

The opinion then cites the cases of *Noyes* v. *Anderson*, *supra*; *Mactier* v. *Osborn*, *supra*, and ends by repudiating any question of accident or mistake in the case, and puts its decision squarely upon the point that the covenant to pay the taxes was intended merely to secure the fulfilment of the contract, and not to enable one party to profit by the default of the other, or to obtain a collateral advantage which was no part of the main design. The court say explicitly:

> "We do not think it was of the essence of the contract that the taxes should be paid on the twentieth days of June and December. The premises could not be sold at tax sale until the sixteenth of January. On the fifteenth Goldstein tendered them to the treasurer, and on the same day tendered to Mr. Neill the amount he had paid, with interest. The rent and taxes since falling due have been tendered, and the plaintiffs in their petition say that they are ready and willing to pay to the lessor any loss, cost, or damage or expense which he may have been put to by reason of any neglect or omission in the punctual discharge of said taxes and assessments, and that they are ready, able, and willing to abide by any order which the court may make in the premises."

If this case is authority for any proposition, it is authority for the broad proposition of *Garner* v. *Hannah*.

We submit upon this point that unless the court shall believe the testimony of the witness Rodgers as to al-

leged representations made by him at the Tax Office of the District of Columbia in May, 1901, and confining our consideration to what had happened prior to that date, no facts have been shown which would bring the complainant within the protection of any of the foregoing cases cited below by her counsel save, *upon a superficial view*, that of *Noyes* v. *Anderson*, in 124th N. Y.

Lessee Continued Breach After She Knew Tax Sale Was Irredeemable—Here Was no Accident or Mistake.

It is submitted, however, that the negligence of the lessee in this case is not helped by the decision in *Noyes* v. *Anderson*. In that case there was one default, and the special circumstances were connected with that. In the case at bar we are dealing with many defaults, beginning in 1898 and continued to 1900

We are also dealing with a man thoroughly conversant with tax defaults, tax sales, and tax redemptions. Harry King *systematically made default in payments of taxes on property of the estate of his father, the original lessee.*

It appears from the testimony of the witness Rodgers (Rec. p. 134), as follows:

> Q. When was it you first learned anything about these other tax bills that you produced here, the tax bill for 1898 and the one for 1899 ?
>
> A. When I went to pay this check, No. 7923, on May 24, 1901.
>
> Q. That is your second visit to the office ?
>
> A. Yes, sir; on this amount (account). I have been there hundreds of times. It was the second time on this branch bill.
>
> Q. Between those times, July 24, 1900, and May 24, 1901, how often had you been to the tax office ?
>
> A. Probably fifty times.
>
> Q. About what ?

A. About property Mr. Harry King was receiver for, all over the city, northwest, northeast, southwest, and southeast.

Again (Rec. p. 136):

Q. What other taxes did you pay in May, 1901?

A. I couldn't tell that exactly. I was paying taxes all the time. The Kings own property all over the city, coming due at different times, etc., from the rents they were receiving. There would hardly be a month that I wouldn't be paying taxes.

(Rec. p. 137):

Q. How many hundred times do you think you went down there?

A. I couldn't say. In the two years that I was with King I don't think there was ever a week that I wasn't there.

The witness, Harry King, testifies as follows (Rec. p. 186):

A. We allowed a good many debts of the estate to go by. Some of the interest was not paid promptly and the taxes were not paid promptly.

Q. That was on your father's property?

A. Yes.

Property of Estate Sold at Tax Sales.

(Rec. p. 192):

Q. I think you said there were some forty pieces of property belonging to that estate (estate of original lessee)?

A. Yes, sir.

Q. And to that receivership?

A. In the neighborhood of that number.

Q. Have you any idea of the number of those pieces of property that were ever sold at tax sale?

A. No, sir; I have no idea of the number of them that have been sold.

Q. Can you tell whether there were three or thirty?

A. There were some sold at different times, which were redeemed whenever we got the money. Unfortunately the estate did not have much money.

Q. Don't you know whether there were three or thirty?

A. Don't try to tie me down to any certain number. I can merely tell you that at times there were various pieces of property involved in the non-payment of taxes which the receivers did not have the funds to meet.

Q. You can not tell me whether you redeemed as many as three sales?

A. Yes; a great many more than that.

Q. Do you think you redeemed as many as ten?

A. Possibly.

Q. Have you any idea how many were redeemed between the commencement of the receivership and the spring of 1900?

A. No, sir; I can not tell you.

Q. Had any of those arrears of taxes subsisted prior to your father's death?

A. Yes, sir.

Q. Had you had anything to do with paying the taxes on his estate during his lifetime?

A. As I have stated before, I occasionally paid the taxes.

Q. For him?

A. Yes, sir; of course.

Q. And you got the tax bills?

A. I suppose they are at the store.

Q. I want to know whether you actually went to the tax office and got the tax bills, and paid them during your father's lifetime?

A. Once in a while; yes, sir.

Q. Can you tell us whether or not any of the property was ever sold for taxes, and redeemed, in his lifetime?

A. I think it was.

Q. For how long a time before his death had there been default and arrearages of taxes?

A. That I could not answer.

Q. Can you say whether it was three years or five?

A. I can not answer you that. It might have been six months, and it might have been a year; I can not say.

Q. How old are you?

A. I am thirty-eight years old.

. . . . . .

Q. You say you knew Mr. Wiltsie as a tax speculator?

A. Yes, sir.

Q. How long had you known him to be a man engaged in that business?

A. That I could not say.

Q. Could you say whether it was a month or six months or a year or three years?

A. I think it was a few years.

Q. Had you ever had any transactions with him in your father's lifetime?

A. I never had to my knowledge.

Q. Do you know of your father ever having had any?

A. That I could not say.

Harry King Had Redeemed Other Tax Sales From Wiltsie.

All doubt upon this matter is removed by the witness' own letter to Wiltsie (Rec. p. 56), dated September 21, 1901, from which we make the following extract:

> In view of the fact that the penalties on this property are heavy and the amount for which it was sold was very small, I think that a redemption of $50 would be about just and equitable. I hardly think it is your desire to squeeze us or to be unreasonable. *Unfortunately we have paid you quite a considerable amount of money in the past for tax sales.* We are not interested in this piece of property in any way except as tenant, as we are not the owners or the mortgagees. If it should meet with your approval send us a bill and we will send check.
>
> Respectfully yours, HARRY KING.

It is apparent from the foregoing testimony that the taxes on the property in question here were not paid from December, 1897, until July, 1900, not by reason of any mental distress on the part of the financial manager, Harry King, or from any lack of knowledge on his part that the lessee was bound to pay them, or from any misconception that Mrs. Kennedy expected to pay them herself and have the lessee reimburse her, as she had done in the lifetime of the original lessee. He knew well that she expected them to be paid directly by the assignee of the lease.

No complaint was made in the bill that he was misled. None was ever made to Mrs. Kennedy during her lifetime; none was made to Webb after her death. The fact that these taxes had not been paid and that Wiltsie had got an irredeemable tax title in consequence was carefully suppressed, and Harry King dealt with Wiltsie at his lessor's risk and while she was ignorant of his repeated breaches.

This is the more remarkable because Wiltsie had said to Harry King, in his letter to the lessee of July 24, 1901:

> "I am informed that you are interested in the premises as owner or mortgagee. If I am wrongly informed I shall esteem it as a favor if you will kindly state that fact, *and give me the name and address of some interested party*" (Rec. p. 285).

We submit that here is no case of accident or mistake under any authority hereinbefore cited.

But the facts occurring subsequent to July 24, 1901, render the preceding argument and authorities irrelevant. On this date Harry King received Wiltsie's letter notifying him that he held an irredeemable tax title to the demised premises. All questions of accident, inadvertence, and mistake now disappear.

If he had been misled by Mrs. Kennedy's prior conduct in herself paying the taxes prior to his father's death,

now was the time to make the claim. It was not made. The default and its consequences are not communicated to Mrs. Kennedy, and her counsel, Webb, only learns it by accident late in the following September.

Of Harry King's conduct from July 24 to October, 1901, the Court of Appeals say (21 App. D. C., p. 149):

> "With reference to the first of these questions, notwithstanding that the complainant in the cause should have found it to be *to her best interest* not to higgle with the holder of the tax certificate for the comparatively small difference between them we fail to find, as matter of law, at this stage of the case that there was any such delay or laches on her part as would preclude her from relief in equity. It is evident that her failure to pay the taxes in the first instance was due, as she states, to inadvertence, *since she paid all the subsequently accruing taxes* down to the time of the filing of her bill. And we can not hold that her delay in redeeming the tax certificate was wholly unreasonable, in view of the fact that she had been advised that the sale for taxes was invalid."

The italics in the above extract are ours. We venture to ask where, in the two opinions of the Court of Appeals in this case, are the interests of the lessor made a subject of judicial consideration? We further suggest that the record shows that from the assignment of the lease, in August, 1897, to October, 1901, the only instalment of taxes which was paid when due was the one accruing due and payable in May, 1901.

Every other tax accruing due during this entire period was either not paid at all or only after it had become in default and subject to penalties, and in some instances by way of redemption after a sale of the property for such default (Rec. pp. 168–9, 170, 187–9, 279–284).

In addition, the taxes on the rear portion of the demised premises were not paid at all, although they were

within the lessee's covenant. In this connection the court should not be misled by the language of the stipulation of counsel (Rec. p. 482) to the effect that Mrs. Kennedy paid certain taxes on this rear part of the demised premises. The court will see that these taxes were all paid on October 14, 1901. They were in default and were then paid by Webb (Rec. pp. 82, 86, 99, 295). The date of payment, October 14, 1901, was long subsequent to the defaults of the Kings, as the stipulation itself shows. The circumstances of the payment are explained in the final paragraph of Webb's letter of October 14, 1901, to Darlington and Tobriner (Rec. pp. 294–295).

We respectfully submit that under these circumstances all suggestions of accident and mistake disappear from the case. From July 24, 1901, Harry King took, without authority, from the lessor, and while she was ignorant of the dangerous situation, the risk of Wiltsie's disposing of his irredeemable tax title to any third person to whom he might choose to transfer it. Did he not thereby waive all questions of accident, inadvertence, or mistake, as well as all claims that Mrs. Kennedy had misled him? It is true that he says he had the advice of Mr. Tobriner that the tax sale was invalid. Did this justify him, *without her knowledge or authority*, in subjecting her to the danger of losing her property, worth, on the estimation hereinbefore given, $80,000, or, if his own statement be preferred, worth $50,000?

It would seem that no subsequent events could affect the situation which we have up to this point.

Here is a breach of covenant which has resulted in a third person's acquiring an irredeemable tax title to the demised premises without any fault on the part of the lessor.

How can any subsequent event legally alter this situation?

It is sought, however, to alter it by what counsel for

the lessee suppose to be a charge of fraud against the defendants, Webb, Cohen, and the Kanns.

Consideration of Charges of Fraud.

Before we consider this charge let us briefly inquire what the rights of the lessor were when through her counsel, Webb, she learned of the situation late in September, 1901.

What could Webb, acting for the lessor, legally do to relieve that situation?

The answer to the question is given in the opinion of the Supreme Court of Utah in the case *Bacon* v. *Park* (*supra*). In that case the lessor when he learned that the lessee had broken his covenant to pay taxes, that in consequence thereof his (lessor's) property had been sold for taxes, and that the time for redemption had nearly expired, at once forfeited the lease, and made a new lease to a third person by which he raised the money required to redeem the property from the tax sale. Of his action the court says:

> "The plaintiff was aware of the covenants in the lease relating to forfeiture. He knew that default had been made in the payment of taxes for several years (the deficit for taxes amounted to about $4,000), and that the premises had been sold for the non-payment of the same; and that the time to redeem had nearly expired, yet he did not intend to redeem until the last day. Such intention and such delay was a gross violation of the covenants of the lease. The evidence shows that Mr. Park was in straightened circumstances. His property was in danger of being sacrificed for the non-payment of taxes. By forfeiting the lease he ascertained that he could raise the money necessary to redeem the property, by releasing the same. It would have been reckless on his part to let such an opportunity pass, and it was absurd for the plaintiff to expect that the lessor

> would not assert his right of forfeiture for the non-payment of taxes until the last day for redemption of the same from the tax sale."

It is difficult to conceive how the law could be otherwise.

Webb could have himself redeemed this tax sale from the proceeds of a new lease to the Kanns, or to any one.

The lessor's motives for declaring a forfeiture are, from a legal point of view, absolutely immaterial.

If Webb had not the necessary money himself, he could have dealt with the situation in any manner that seemed best to him, and it would not have lain in the lessee's mouth to complain of him.

Let us now consider the subsequent events as they followed:

As these events will be subsequently given in detail, only a brief statement of them will now be made.

When Webb learned from Knight of the situation he verified the latter's information and then told Mrs. Kennedy of it. She expressed anxiety as to getting a new tenant. Some months before the Kanns had said casually to Webb that they would pay more rent for the premises. Bearing this in mind Webb went to see Cohen, their attorney, and learned that the offer was still open. At this interview Webb told Cohen that the tax title was irredeemable and who the purchaser was. Thereupon, Mrs. Kennedy determined to forfeit the lease and sent the lessee the letter of October 1, 1901 (Rec. p. 20). Cohen determined to himself buy the tax title and, against Webb's remonstrance, did in fact buy it with the purpose of holding it over the lessor to compel the new lease to the Kanns. His and Webb's acts in this regard will be fully considered later.

When the lessee received Mrs. Kennedy's letter declaring the forfeiture, she retained her present counsel,

Messrs. Darlington and Tobriner, and a long correspondence ensued between them and Webb, a careful reading of which is necessary. The letters are in sequence of date as follows :

Darlington & Tobriner to lessor, October 8, 1901 (Rec. p. 21).

Webb to Darlington & Tobriner, October, 10 1901 (Rec. p. 21.)

Darlington & Tobriner to Webb, October 12, 1901 (Rec. p. 22).

Webb to Darlington & Tobriner, October 14, 1901 (Rec. p. 23).

Lessor to Darlington & Tobriner, October 14, 1901 (Rec. p. 24).

Tobriner to Webb, October 17, 1901 (Rec. p. 86).

Webb to Tobriner, October 18, 1901 (Rec. p. 295).

Tobriner to Webb, October 22, 1901 (Rec. p. 86).

Webb to Tobriner, October 22, 1901 (Rec. p. 87).

Lessor to lessee, October 22, 1901 (Rec. p. 87).

Webb to Darlington, October 29, 1901 (Rec. p. 428).

Darlington to Webb, October 29, 1901 (Rec. p. 428).

Webb to Darlington, October 29, 1901 (Rec. p. 429).

Webb to Darlington, October 30, 1901 (Rec. p. 87).

Darlington & Tobriner to Webb, November 1, 1901 (Rec. p. 89).

As appears from these letters the lessee was down to a certain point requesting the lessor to permit the use of her name in litigation for the purpose of avoiding the tax title, and was promising full indemnity from the tax sale and payment of all costs and counsel fees which the lessor might incur in complying with this request. It further appears that about October 22, 1901, the granting of a new lease from the lessor to the lessee upon new terms was under discussion. Finally, on October 30, Webb makes a proposition of compromise, and on No-

vember 1 Darlington and Tobriner reply. This is a very important letter. It abandons all thought of indemnity and threatens litigation.

What is more serious, it contains what its writers apparently thought were grave charges against Webb (Rec. pp. 89–91). Otherwise they could hardly have used to Webb language contained in that letter.

The court will observe in its fourth paragraph the following words: "*We know clearly, and are able to prove, the following facts.*" Then follow four propositions of fact. At the close of the next paragraph is the following sentence:

> "*In other words, that Mrs. Kennedy, personally and through agencies invoked in her behalf, actively prevented the redemption of the tax certificate, and actually procured its withdrawal from the bank here in Washington where it had been deposited for the purpose of being redeemed.*"

Then follows this assertion:

> "*These now undisputed facts create the inevitable alternatives following:*
>
> "1. That the purchase was made by Mr. Cohen on behalf of the Messrs. Kann with an understanding or agreement between them and Mrs. Kennedy, acting either personally or through her representative, that the tax deed should not jeopardize the title to her property, or—
>
> "2. That Mrs. Kennedy, or her representative, stood by acquiescing, by inaction if not affirmatively, in the purchase of the tax deed to her property, without protecting her in any way from the loss of her property through the said transaction—and that this was done well knowing at the time that the slightest intimation to Mrs. King of the proposed purchase of the tax certificate would have led to instant protection against such a contingency."

Next is this statement: "*The latter of these alternatives, it seems to us is wholly inconceivable.*" Then follows a sentence which, in view of the fact that the writers clearly understood that Mr. Webb was the person who had acted for Mrs. Kennedy, as her advisor, is most offensive to him:

> "*You will pardon our speaking very plainly upon this subject, as we do so in the sincere desire to state the matter with absolute frankness, now, before litigation begins, in order that the full bearing of the case may be appreciated before it may be too late to avoid any unpleasant consequences which may arise.*"

Then ensues this sentence:

> "*Making, further, a frank disclosure to you of our present views of this case, we beg to say that, in our opinion, Mrs. King has, now, two defenses: namely, the defense of irregularity of the tax proceeding, and of her equitable right to be relieved against the forfeiture, under the circumstances, and, secondly, a defense in a court of equity against the methods above mentioned for depriving her of her lease, and of her right to apply to a court of equity for relief against the forfeiture.*"

It would seem that counsel for the plaintiff clearly meant by their language, above quoted, to assure Mr. Webb that in order to prevent any unpleasant consequences which should arise to himself, they were going to be perfectly frank with him and to state that if they were driven to litigation they would prove facts within their power to prove, and really undisputed, from which two alternatives would arise, one of which was inconceivable and the other of which was that he had knowingly colluded with the defendant Cohen in the purchase of the tax title in question. We must, therefore, assume

that the charge made against the defendant Webb is as has been stated. When we come to consider the charge made in the bill (Rec. p. 6) we find that language is used which could have been intended to have no other meaning than the charge made in the letter. The language used in the bill is as follows :

> "The complainant is further advised and believes, and therefore avers, that it never was contemplated upon the part of either the defendants, Marianne A. B. Kennedy, or the defendants, Kann, that the said tax certificate should be purchased for the purpose of using the same adversely to her or in any manner to endanger her title to the very valuable property in question; that an agreement or understanding, whether expressed or tacit, existed between them that the said tax title should be used only in furtherance of the common design to have the complainant's lease forfeited by reason of her inadvertent omission to pay the single instalment of tax in question, and thereupon to dispossess her and to have the defendants, Kann, enter upon and take possession of her said premises as tenant of the said Marianne A. B. Kennedy, at an increased rental."

The bill further avers that this agreement or understanding was of such an improper nature that the defendant Cohen was unable to sleep during his night journey to Rochester, N. Y., by reason of doubts as to the propriety of this understanding (Rec. p. 6).

There can be no question, then, that the answer is intended to charge upon the defendant Webb the same (in their opinion) illegal and dishonorable conduct that the letter of counsel imputes to him. When the witness Tobriner was upon the stand he was asked the question (Rec. p. 245) whether or not he understood that charges of collusion in this connection against Webb were made

by the bill. As counsel consider the colloquy in that connection of importance, they here print it in full:

Cross-examination by Mr. JOHNSON:

Q. Mr. Tobriner, you signed with Mr. Darlington, as solicitor for the complainant, the bill of complaint in this cause? A. Yes, sir.

Q. Did you take part with Mr. Darlington in its preparation? A. Yes, sir; to a certain extent.

Q. You were aware at that time of the facts as to which you have testified, occurring antecedent to the filing of the bill, of course? A. Yes.

Q. In view of any objection made to some of your testimony, and the suggestion of counsel with regard to it, I will ask you to state, if you can, what, if any, part of the bill in this case charges collusion between Mr. Webb and Mr. Cohen or the defendant Kann, with respect to the acquisition or use of this tax certificate from Mr. Wiltsie?

Mr. DARLINGTON: I object to the question and advise the witness not to answer it, my objection being that it calls for no testimony or evidence of facts within his knowledge, but simply asks for his construction of the bill in this case.

Mr. TOBRINER: I wish to add that I am simply here as a witness, and would not feel that I ought to argue the case from the witness stand.

By Mr. JOHNSON:

Q. Do you claim that there is any collusion, or do you say that you believe there was any collusion between them?

Mr. DARLINGTON: I object on the ground that Mr. Tobriner is placed here to state what he knows about the facts in this case, and not to state what his claim will be as counsel in the case. I advise that he decline to answer on that account.

By Mr. JOHNSON:

Q. Is it not a fact that in the preliminary hearing of this case before Mr. Justice Clabaugh, on the motion for an injunction, that the court asked if you claimed that Mr. Webb and Mr. Cohen and the Kanns were in collusion in this matter, and

that you disclaimed any such charge? A. I do not recall that the court asked the question, and I do not recall that we disclaimed it.

Q. Do you not recall that that was one of the subjects argued then, and that the judge laid considerable stress on the absence of any such claim in the proceedings? A. I do not.

Q. Do you recall that in the course of the argument Mr. Darlington also admitted that they did not charge such collusion between Mr. Webb and Mr. Cohen or the Kanns? A. I do not.

Q. Or that there was any conspiracy between them, to accomplish anything? A. I do not so recall.

Q. Do you recall Judge Clabaugh saying that the bill did not charge conspiracy between them, and the disclaimer on your part and that of Mr. Darlington?

Mr. DARLINGTON: I object, because, in the first place, this is not calling for evidence of facts in the case, and, secondly, because what took place between counsel and the court at the argument of the motion for an injunction *pendente lite* is not a proper subject for cross-examination of this witness, and for the further reason that Judge Clabaugh's opinion in the case is in writing, and I think it will be found to contain no such statement. I am quite willing that the opinion may be offered in evidence to show whether I am right or wrong about this.

In view of the failure of Mr. Tobriner to answer, and of the objections of Mr. Darlington to his answering this question, counsel for the defendant Webb are compelled to assume that the charge made in the letter referred to and in the bill is a charge intended to be made in the bill and claimed to be sustained by the testimony.

While upon the argument below counsel asserted that they intended to make no attack upon Webb, they did not withdraw these charges.

Most extraordinary of all, while Webb, in his sworn

answer and in an affidavit, had used the strongest language, denying the charges of this letter (Rec. pp. 80, 81), and while he had as emphatically denied this in his testimony (Rec. pp 288, 302, 312, 313–315, 324, 325), and while Cohen has made the same denial (Rec. pp. 361, 364, 365); yet the Court of Appeals, while acquitting all parties of any improper conduct, uses the following language (25 App. D. C. 188), which can have only one interpretation :

> "3. The defense of multifariousness in the bill of complaint is again insisted on, as it was at the former hearing. But we think that what we said at that former hearing must suffice to dispose of the objection now. The determination of that question depends upon the inquiry as to whether there was an arrangement, or understanding, or combination, or whatever we may call it, between the defendants to the suit, whereby the tax certificate that had been issued against the property involved in the proceedings was to be acquired and used in the interests of the Kanns to coerce the appellee out of the property, and to enable the Kanns to become the possessors or lessees of it. We find no evidence whatever in the record of any fraud or wrongdoing perpetrated by any one concerned. We only find the evidence of a situation created by keen commercial rivalry and shrewd management, wholly untainted by wrongdoing, but still a situation from which injury is threatened to the complainant's rights of property, and against which she is entitled to be relieved. For that there was an arrangement between the defendants whereby the tax certificate was to be used to oust the complainant from the property, we think is too plain to be reasonably questioned. There was, undoubtedly, a concurrence of effort for that purpose, perhaps no formal combination or preconcerted action. But it matters not what we call it. The undoubted fact is, that there was cooperation between the defendants to use the tax certificate to the detriment of the

complainant's rights; and, there being such cooperation, the defense of multifariousness can not avail. The one purpose of the bill is to relieve the complainant from the effect of this tax certificate and of the tax title based upon it."

It is most earnestly contended on behalf of the defendant Webb that there is not in the whole case one word of testimony to justify this finding as against the oaths of Webb and of Cohen Before considering in detail this testimony let us say this as to charges of fraud generally:

Inasmuch as the charge against the defendants is that of actual fraud, recovery must be had upon that ground or not at all. The Supreme Court of the United States has followed the leading English case of *Price* v. *Berrington*, 7 English Law and Equity, 254. In the case of *Eyre et al.* v. *Potter, et al.*, decided by a unanimous court in the year 1853 (15 How. p. 42), the court say (p. 56) as follows :

"And here it may be proper to premise, that in the examination of the case made by the bill, it can not be considered as one of constructive fraud, arising out of some peculiar relation sustained to each other by the complainant and the defendants, and, therefore, to be dealt with by the law under the necessity for protecting such relation, but it is one of actual, positive fraud, charged, and to be judged of, according to its features and character, as delineated by the complainant, and, according to the proofs adduced to establish that character. Although cases of constructive fraud are equally cognizable, by a court of equity, with cases of direct or positive fraud, yet the two classes of cases would be met by a defendant in a very different manner. It seems to be an established doctrine of a court of equity, that when the bill sets up a case of actual fraud, and makes that the ground of the prayer for relief, the plaintiff will not be entitled to a decree, by establishing some of the facts quite independent of fraud, but which

might of themselves create a case under a totally distinct head of equity from that which would be applicable to the case of fraud originally stated. In support of this position may be cited, as directly in point, the case of *Price* v. *Berrington*, decided by Lord Chancellor Truro, in 1851 (vide 7 Eng. Law & Eq. 254).

"The defendants, in this case, were clothed with no special function, no trust which they were bound to guard, or to fulfill for the benefit of the complainant; they were not even the depositaries of any peculiar facts or information as to the subject-matter of their transactions, or which were not accessible to all the world, and by an omission or failure in the disclosure of which they could be regarded as perpetrating a fraud."

This case is a leading and controlling one.

The recent case of *Warner* v. *Godfrey*, 186 U. S. p. 365, is an instructive one in this connection, both upon the main point decided in *Eyre* v. *Potter*, and also to the effect that where a party had ample opportunity to accept more than he was entitled to and has refused it, he can not afterwards elect to change his attitude and accept it.

In the case at bar it will be recollected that Webb, in his letter of October 30, offered the plaintiff what she was not entitled to as a matter of right. This offer her counsel declined.

Upon the general point the court say (p. 379):

"The complainant thus having expressly declined to put an end to the litigation, upon the theory that because of the *mala fides* of Warner and Wine she was entitled to an unconditional recovery of the property, she ought not, in equity, upon the collapse of her efforts to establish fraud and bad faith on the part of the defendants, to be allowed to reform her pleadings and change her attitude towards the defendants in order to obtain that which she had expressly elected not to seek and had persistently declined to accept."

We proceed now with a detailed consideration of the testimony in connection with acts of Webb criticised by the lessee.

Consideration of Testimony on Subject of Fraud.

Let us say at the outset that the pleadings in the case contain a direct and positive denial on the part of all persons who could have had any knowledge of the facts of any collusion whatever between the defendants Webb, Cohen, and the Kanns, or any of them, with respect to the acquisition by the Kanns, through Cohen, of the tax deed in question. The testimony of the defendant Webb begins at page 286 of the record, and contains a succinct statement as to his connection with the matters in controversy. He says that he first learned that the property had been sold for taxes on the 25th day of September, 1901, from a man by the name of Charles H. Knight, who called upon him about 3 o'clock in the afternoon of that day. That same evening he called upon his client, Mrs. Kennedy, and made an engagement with her, but had no consultation with her that evening. The next day he visited the tax office and found out that the statements made by Knight were true, and that the tax sale was irredeemable. That same afternoon, about 4.30, he called upon Mrs. Kennedy and laid the facts before her. The next thing that happened was on the 27th of September, which was Friday, when he was called to New York, and wrote her a short note.

On his return to Washington he found a letter from Mrs. Kennedy in his office inquiring where she could get a new tenant. The next thing that he did was to see Mr. Myer Cohen and ask him if his clients, Kann Brothers, would take the premises at $300 a month rent if he was able to rent it to them. Cohen informed him that he would ascertain the fact and let Webb know. Cohen called at his office the same day about 1 o'clock, and said the Kanns

would take the premises if he could deliver possession. Cohen was the counsel of the Kanns, and Webb went to him as a more convenient way of communicating with them. He knew the Kanns very slightly, and once, in talking about this store, as they knew that he was Mrs. Kennedy's attorney, one of them said to him casually that they would take the store and pay Mrs. Kennedy $300 a month for it and all expenses. At that time nothing further was said about it. This conversation occurred in the month of June, 1901.

Having obtained that fact from Cohen, on the afternoon of the 30th of September, Webb went up to see Mrs. Kennedy and laid the whole situation before her. Later in the same afternoon, about 6 o'clock, he reached his house, and he found Cohen and his partner, Wolf, standing on the front doorstep. Cohen then said to him: "I have come to tell you that I am going to Rochester to buy that tax title, and we now shall deal at arms' length." Thereupon Webb asked him not to do that, but Cohen insisted upon going; whereupon Webb said: "I see no way to prevent it." Webb then said that he did not want him to go because he, Cohen, acted on information that he had obtained from Webb. Cohen then informed Webb that he had not learned this fact from him, Webb, but that Knight had been to see the Kanns before he came to Webb, and told them about it; and he also said they had sent Knight to Webb.

This is all that occurred between Webb and Cohen or the Kanns prior to the purchase by Cohen of the tax title. On page 302 the witness Webb is asked the following questions:

> Q. When and from whom did you first learn that any correspondence or negotiations between Mrs. King or anybody representing her, and Mr. Wiltsie, was in progress for the purchase of the tax certificate in question?

A. I first learned from Myer Cohen on or about the 8th day of October, 1901,

Q. It has been charged in this case that the purchase of this tax certificate by Mr. Cohen was made either at your instance or with your acquiescence. Is that correct?

A. No; on the contrary, it was made against my wishes and against my protest.

Q. It has been charged in this case that this proceeding to enforce the forfeiture of the lease, on account of the breach of the covenant to pay taxes, was forced upon the late Mrs. Kennedy and was not voluntary upon her part. So far as you know, is or is not that correct?

A. It is not correct.

It is further stated by the witness Webb (Rec. p. 357) that the compromise with the Kanns involved the surrender by them of the tax title which they held.

The testimony of the witness Cohen goes into all of the circumstances in great detail. So much of it as precedes his visit to Rochester will be found at pages 358 to 365 of the record. It will be recalled that the answers of the defendant, Webb, Cohen, and of the Kanns, all deny explicitly that there was any collusion whatever between Webb and any of them in the visit of Cohen to Rochester and in the purchase of the tax title in question. When to these positive denials there is added the statement of the only parties who came into contact with each other, viz, Webb and Cohen, the conclusion must be that the charges of counsel's letter of November 1, 1901, and of the bill, with respect to collusion, are all absolutely without foundation.

Detailed Consideration of the Acts of Webb, Cohen, and the Kanns Complained of by the Kings.

(*a*) *Offer of the Kanns in the spring or early summer of 1901 to pay Mrs. Kennedy $1,200 a year more for the premises in controversy than the Kings were paying.*

The testimony of Webb upon this point will be found at pages 305 and 306 of the record. That of Cohen will be found at pages 359 and 360. It appears that some time in May or June, 1901, Louis Kann said to Webb that if they, the Kanns, could get the property they would pay $300 a month for it and all expenses. That the Kanns had a right to make this offer can hardly be controverted. That Webb had a right to listen to it is equally certain. The Kanns were rival merchants and doubtless eager to do anything legal that would give them an advantage. Webb was satisfied that the King's lease was an extremely unfavorable one for the interests of his client, Mrs. Kennedy, and would have advised her to adopt any legal method to terminate it. Counsel know of no rule of law which made either the Kanns or Cohen or Webb guardian of the Kings. Their relations, as the law regards them, were merely and absolutely legal relations, and as such we shall discuss them.

(*b*) *Visit of Knight to the Kanns on September 19 or 20, 1901.*

It appears from the answer of the Kanns (Rec. p. 65) and the testimony of Charles H. Knight (Rec. p. 447) that the said Knight, in the latter part of September, 1901 (Webb says the 19th or 20th), called at the place of business of the Kanns and notified them that taxes on the premises in question were in arrears, and that the property had been sold for the same.

Inasmuch as counsel for the Kings lay great stress upon the fact, which will presently be considered, that later Webb informed Cohen that the tax sale in question was irredeemable, it may be well to say a few words upon facts which are so well known that the court will take judicial notice of them. By a law which has been in force in the District of Columbia for almost a century, land, taxes upon which are not paid when due, is advertised shortly

after default and sold at public auction to the highest bidder. Thereupon a certificate is issued by the District authorities to the purchaser, which certificate bears a high rate of interest, and is assignable.

These tax sales, showing the date and amount of the same, and the names of the purchasers, are matters of public record, and can be ascertained by persons desirous of so doing, at the District offices, in the office of the Recorder of Deeds, or at the offices of any company whose business it is to examine titles to real estate in the District. At any time within two years from the date of sale the owner, or any one whose interest it is so to do, can pay into the District office the amount for which the said sale was made and all interest, expenses, and penalties accruing thereon or connected therewith. At the end of two years from the date of sale these certificates become irredeemable and the holder of them is entitled to a tax deed from the District authorities conveying to him the land so sold. Therefore the object for which Knight went to see the Kanns was not to inform them that a sale had been made, but that the tax title had become irredeemable and would have to be vacated through some legal proceedings. Knight says (Rec. p. 449) that he makes a specialty of getting contracts for the annulment of tax sales, and that his purpose in calling on the Kanns was to get a contract with them for the annulment of the tax sale with respect to the premises in question. He further says, upon the same page:

> "I told him (one of the Kanns) that I wished to see the owner, or person that had control of it (the premises); that the property had been sold for taxes, and that I believed the sale was illegal."

It is denied in the answer of the Kanns that Knight said anything to them about the illegality of the sale. Knight was thereupon informed that the premises in

question were not those occupied by the Kanns, but that they belonged to Mrs. Kennedy, and that the defendant Webb was her attorney.

Recurring to the testimony of Cohen (Rec. pp. 358–9) it appears that on the 19th or 20th of September, 1901, Louis Kann informed him of Knight's visit, and that Knight had said that the premises in question had been sold for taxes and that they had referred him to Webb. At that time Cohen did nothing whatever with respect to this information, nor did the Kanns, although he says that he knew of the provisions of the Kings' lease and regarded the situation as a dangerous one for the Kings and for their landlord. His long cross-examination upon this point is absolutely irrelevant.

(*c*) *Knight's visit to Webb.*

It appears from the testimony of both Webb (Rec. p. 286) and Knight (Rec. p. 448) that, on the same day of the visit to the Kanns, Knight went to see Webb for the purpose of learning what his relation was to the owner of the property with a view of getting a contract for the cancellation or annulment of the tax sale that was against the property. As appears from the cross-examination of Cohen by Mr. Darlington (Rec. p. 382), the tax sale in question could not, nor could any tax certificate, have been of particular value to anybody until it became irredeemable. Prior to that time it was simply a debt that could have been readily paid. Therefore Knight would not have been wanting contracts to vacate tax sales until they had become irredeemable. Any one having any knowledge of tax sales would know that before they became irredeemable they were simply debts—very dangerous debts, it is true, but yet only debts. It appears from the testimony of Webb (Rec. p. 348) that the next day he went down to the tax office and found that Knight's statement to him was true.

(*d*) *Webb's consequent interview with Mrs. Kennedy.* Thereupon Webb communicated the situation to Mrs. Kennedy, telling her what her legal rights were, and submitted the matter to her determination. Before receiving her answer he went to New York. Upon his return he received the letter, already printed (Rec. p. 308), and containing this sentence:

> "You say I must not receive the rent, which he will probably send to me by mail on Tuesday morning, but I do not see how I can refuse it, unless I know when I am to get another tenant."

Thereupon Webb went to see Cohen and had the conversation with him narrated by Webb (Rec. p. 286) and by Cohen (Rec. pp. 384–387). The substance of this interview was that Webb asked Cohen if his client, the Kanns, would be still willing to take the property in question at an advance of $1,200 a year. Upon Cohen's inquiry, Webb informed him that the Kings had allowed the property to be sold for taxes, and that the sale had become irredeemable, and that Mrs. Kennedy proposed to forfeit the lease by reason of such fact.

The sequence of events here would appear to be very simple and natural, and the events themselves strictly legal. Webb learned from Knight, whose information he verified at the appropriate office, that a tax sale had occurred and had become irredeemable. Under the covenants of the lease this operated as a forfeiture of the term. He advised his client as to the legal right which she had to avail herself of this forfeiture. She hesitated to do so until she knew that she could get a new tenant. Webb, in order to answer this question, immediately set himself to work to procure, if he could, a new and a more advantageous tenant. He naturally went to see the Kanns, whose interest it was to acquire the premises, and who had offered to give what he considered a satisfactory price for it.

Down to this point any criticism of either his acts or those of Mrs. Kennedy can not be made from a legal standpoint. We can understand that if Mrs. Kennedy desired to do a friendly act to the Kings she would have informed them of the forfeiture and would have given them an opportunity of redeeming it. But it is not necessary to say that we are not concerned with other than legal relations, and any criticism which in a court of law or equity is based upon an assertion that litigants have failed in friendship or in generosity or in charity is unjustifiable because irrevelant. The rule, "Do unto others as you would that they should do unto you," is not a legal rule. The rule of the law is rather expressed by the maxim "*caveat emptor.*" Counsel who assume so lofty a standard can not justify themselves in the endeavor to control legal relationships and legal principles by exciting prejudices which some may naturally feel when they contemplate what they consider ungenerous and uncharitable conduct on the part of others. We, therefore, confidently assert that no legal criticism, no competent criticism in a court of justice, can be made of either Mrs. Kennedy or Webb or the Kanns, because the Kanns were willing to take, and Webb and Mrs. Kennedy were willing to give, the result of a forfeiture which the Kings had unfortunately incurred through what abundantly appears to be mere gross negligence.

The point, however, which is apparently a matter of astonishment to counsel for the Kings, is that Webb not only told Cohen that there was a tax sale, but that it was irredeemable. Upon this point there was a characteristic and utterly irrelevant cross-examination of the defendant Webb. As has been said, the relevant fact in connection with a tax sale, so far as third persons are concerned, is that it is no longer redeemable. The very fact that Webb was proposing a forfeiture of the Kings' lease, and the giving of a new lease to the Kanns, was in

itself information to Cohen that the tax sale was irredeemable. If he needed further information on the subject, he could have obtained it at the office of the recorder of deeds, at the municipal offices, or at the office of any real estate title company. As has been seen, he already knew from Kann that Knight had been to see the Kanns about the sale, independently of any information given him by Webb. In point of fact, he did exactly as Webb had done, and proceeded to a proper office to verify Knight's information. Webb went, as has been seen, to the District offices. Cohen went, as he describes at great length, to the office of the District Title Insurance Company, and it appears from his testimony (Rec. pp. 362–366), as well as from the testimony of Mr. Newton, president of said company (Rec. pp. 443–447), that he did there verify the statements of Knight and of Webb. Referring to record, page 444, it seems that Mr. Cohen found upon the books of Mr. Newton's company information that the lot in question had been sold to C. H. Wiltsie on the 9th of May, 1889 (*should be April 13, 1899*). And Cohen further says that Newton advised him that the sale was a valid one, although Newton says that Cohen rather overestimated his answer (Rec. p. 447).

Webb himself says (Rec. p. 313): "I gave Mr. Cohen no information that was not on the public records of the District of Columbia." The attempt, therefore, to convict Webb of giving information to Cohen which he could not have otherwise gotten is not ingenuous.

(*c*) *Cohen's determination to buy the tax title in question.*

It appears from the testimony of Cohen (Rec. p. 360) that after Mr. Webb left his office he communicated with his clients by telephone, and learned from them that they were willing to give $300 a month for the property and pay taxes, provided that possession was given to them,

and that their offer should not be used as a means of compelling King to pay a higher rent. The meaning of this last sentence is obvious (Rec. p. 384), although it was attempted to be twisted, upon the cross-examination of Webb, into a strained and unintended signification (Rec. p. 354).

Thereupon Cohen called at Webb's office at about 1 o'clock of the same day and told Webb what his clients had authorized him to do. Webb informed him that Wiltsie lived at Rochester, whereupon Cohen said to Webb: "Well, Webb, why don't you buy that tax certificate yourself?" To which Webb replied: "There is no necessity for that." Cohen answered: "Well, I believe I will buy it." Webb said: "Oh, no; don't do that. I wish you would not complicate the matter." Webb further said that Mrs. Kennedy was going to put the Kings out for failing to pay taxes; that she had determined to forfeit the lease, and that he, Webb, had advised her to return the rent if tendered. Cohen then proceeds to give, at page 361, a statement as to his forming a purpose, after he had seen Webb for the second time on the day in question, to himself buy the tax certificate and hold it for the Kanns. His first step was to pay the visit to the District Title Insurance office, to which reference has already been made above, and to get the information there detailed. He then got authority from the Kanns to go to Rochester and buy the title from Wiltsie. He communicated with a member of the bar, John Ridout (Rec. pp. 367, 441), and asked him Wiltsie's address in Rochester, New York, and got some general information from him with respect to the character of the man. Thereupon he returned to Webb's private residence, at about 6 o'clock that same evening (Rec. pp. 364–5). He told Webb that he was going to Rochester that night to buy the tax certificate, and that thereafter they must deal at arm's length. Webb replied to him: "Oh, Cohen, I

wish you would not do that; I don't know about that." To which Cohen answered: "Well, I do." Webb then said: "You know I mentioned the fact of this tax title to you myself." To which Cohen replied, telling Webb that, as he (Cohen) had informed Webb that morning, he (Cohen) had first heard of the tax sale through Mr. Kann, who had been told of it by Mr. Knight, who, in turn, had informed Mr. Webb. It is thus seen that the information upon which Mr. Cohen acted was derived first from the books of the title company, and, secondly, from information received from Mr. Ridout.

The action of Webb, which is here most seriously criticised, is that he failed to buy the tax title, although Cohen had warned him that he was going himself to Rochester to buy it from Wiltsie, and that he and Webb would have to deal at arm's length.

Before considering this criticism in detail, it may be well to say here that in the opinion of counsel for Webb, as soon as he learned that Mrs. Kennedy's tenants had, against their covenant, allowed her property to be sold for taxes and the tax sale to become irredeemable, it was his very clear duty to advise his client that she could not safely allow the lease to continue; that although it was true that the particular tax title might be defective, and, therefore, innocuous, yet another default might be made, another tax sale might ensue, and that tax sale might be valid. The negligence of the tenants in this important respect demonstrated conclusively that they were dangerous, and that she could not, with a prudent regard for her own interests, allow them to continue as tenants any longer than was absolutely necessary to forfeit the lease and eject them. Counsel would have further advised her from their conviction as to the law then in force that there was no rule of law or equity which could prevent her from enforcing such forfeiture, provided she had done nothing to bring the forfeiture about, so as to estop herself from enforcing it.

Counsel would have further advised her that, inasmuch as the tax sale had already become irredeemable, it could make very little difference to her who held the same; that if it was invalid it could be legally so adjudicated against any one holder quite as well as against another; that if, on the other hand, it was valid, then the terms upon which she could purchase it, if she could purchase it at all, would have to depend upon agreement between the adverse holder and herself; that in the then situation, it being uncertain whether the tax sale was valid or invalid, if she could by a compromise with the holder of the title get rid of litigation over it, it would be a prudent and beneficial thing to do. Further, in the then uncertainty as to validity, if she was reasonably certain of securing an advantageous lease from the Kanns, it would be better for her interests to have the tax title held by them, even though they declared that they would deal with her at arm's length about it than to leave it in the hands of an unknown person, as Wiltsie then was to Webb, who might sell it or who might bring an ejectment upon it. In other words, counsel take the position that were it in fact true (as the evidence shows it is not), that Webb persuaded Cohen to buy this tax title, it would still be an absolutely irrelevant fact in this controversy.

Counsel should further have advised Webb that it would be expedient to enforce the forfeiture before dealing with the question of the tax title; that even had Mrs. Kennedy been in a position to herself purchase it, she should not under the circumstances do it, inasmuch as a claim might have been made by the tenant that through such action she had intended to condone the forfeiture. The present counsel, however, were not consulted by Webb until a later date and phase of the case. While they can understand that the persons beneficially interested in Mrs. Kennedy's estate may criticise Webb's

action and the advice that counsel would have given him, they can not understand the right of the Kings or of their counsel to call into question his action in not himself buying this tax title. The assertion on their part that their landlord is to be blamed because a tax title which had become adverse by their default was not, at any sacrifice or inconvenience, bought in to remedy the consequences of their negligence, is, in the view of counsel for Webb, audacious in the extreme. This, however, is not the point which we are discussing. The charge in the letter of counsel for the tenants and in their bill remains of record and is sustained by the Court of Appeals. This amounts, disclaim it as one may, to a charge and a finding that Webb is testifying falsely when he says that he had nothing whatever to do with the purchase of the tax title in question by Cohen; and that Cohen is testifying falsely when he says, as he does again and again, but explicitly on page 361 of the record, as follows:

> Q. After Mr. Webb told you not to buy the tax certificate did you tell him whether you would or not?
>
> A. I didn't make any reply, when he said to me, "Don't do that," or "don't add that complication," or words to that effect; for my own remark that I might buy it was made in a jocose way at the time.
>
> Q. I will ask you to state whether or not you intended to buy it when you made that remark to him jocosely?
>
> A. I had no intention whatsoever of buying it.
>
> Q. I wish you would state now whether, up to that time, any person whomsoever had suggested to you that you buy it?
>
> A. No, sir.
>
> Q. State whether or not any person, at any time, advised or suggested that you buy it?
>
> A. No, sir.

In this connection counsel for Webb desire again to

refer to the letter of Messrs. Darlington and Tobriner, dated November 1, 1901, and especially to this language on page 90:

> "That Mrs. Kennedy, or her representative, stood by acquiescing, by inaction if not affirmatively, in the purchase of the tax deed to her property, without protecting her in any way from the loss of her property through the said transaction, and that this was done well knowing at the time that the slightest intimation to Mrs. King of the proposed purchase of the tax certificate would have led to instant protection against such a contingency."

If English language has force, it was certainly intended to be charged by these words that the danger to Mrs. Kennedy's property resulted not from the holding of an adverse tax certificate by Wiltsie, but from the charged fact that Webb permitted Cohen to purchase what was already an irredeemable tax sale certificate from Wiltsie, a stranger to Webb. This can not be regarded, in view of the facts, as an ingenuous charge.

Mr. Webb has, however (Rec. p. 96), frankly stated what the reasons for his conduct in this regard were. In his affidavit (and this is referred to not so much as testimony, although, as has been said, counsel for the Kings cross-examined upon portions of these affidavits, but as illustrating Webb's reasons for pursuing the line of conduct he did), he says:

> "To this declaration of said Cohen of his purpose to purchase the tax-sale certificate affiant replied, 'I don't know about that,' indicating his dissent from said Cohen's proposition, to which said Cohen replied, 'Well, I do.' To which affiant replied, 'I am sorry to hear it, but I see no way of preventing you.' And thereupon the said Cohen departed. Said Cohen did not disclose his purpose in seeking to acquire the said tax sale certificate, nor did he make any

other statement with regard thereto than as above quoted. It did not occur to affiant at the time that there was, nor does affiant now know of, any reason which made it of any consequence to his client who should be the owner of said tax sale certificate, so long as it was not owned and controlled by affiant's client. Affiant considered that the said tax sale certificate, if valid, would be equally valid in the hands of any holder; and that, if invalid, it could be set aside when owned by Cohen as readily as if owned by Wiltsie. Had it occurred to affiant that it would be more injurious to his client's interests for Cohen to own said tax sale certificate than for Wiltsie to own it, affiant was powerless to prevent said Cohen's action. Affiant did not know Wiltsie's address in Rochester, nor did he know what amount Wiltsie would demand for the sale of said certificate; and at that hour it was impossible for affiant to have obtained the money necessary to go on to Rochester and attempt to compete with said Cohen for the purchase of said tax sale certificate. Affiant did not then understand, nor does he now understand, that he owed any duty in the premises to the complainant; and he did not then know, nor did he discover until long after the tax deed conveying said property to said Cohen had been executed and recorded, that the complainant had had an option from Wiltsie to purchase said tax sale certificate since the 25th of July, 1901, and had failed to do so. Affiant did not then know, and did not discover until long after the execution of said tax deed to said Cohen, that the said tax sale certificate was then and had been since the 25th day of September in the Central National Bank, of this city, subject to the complainant's purchase, and that it remained there until after the close of banking hours on the 1st day of October, which affiant has since learned to be the fact. Affiant never at any time entered into any agreement, understanding, or arrangement, express or tacit, or of any sort whatsoever, as to the purchase of said tax sale

certificate, or the use which was to be made of the same when purchased by said Cohen; and every averment, suggestion, intimation, and insinuation in the bill of complaint to that effect is an unmitigated falsehood and is devoid of any foundation."

The substance of these averments of his affidavit the witness Webb repeated again and again in his examination and cross-examinations (see record, pp. 313, 317).

At page 329 the witness is asked by Mr. Darlington the following questions:

Q. And even the suggestion of Mr. Cohen to you that you ought to get that outstanding cloud against your client's title did not strike you with any more force than that?

A. No; I did not intend to buy it at that time. Of course I intended to attend to it when I was ready to do so.

Q. Then when Mr. Cohen told you he was going to buy it on the same day, why was it, if you intended to attend to it sometime, you didn't take it up before Mr. Cohen got it?

Mr. PERRY: I object to this, because the witness has repeatedly answered why he did it.

A. I can only answer that as I did before, that I did not regard the tax title in Mr. Cohen's hands as any more dangerous than it was in Wiltsie's hands.

Q. You tell us now that when Mr. Cohen suggested to you to buy up this outstanding lien you said it was not necessary, and that you did intend to attend to it later. If you did intend to attend to it later, why was it, when you had notice that Mr. Cohen was going to buy it up adversely to your client and hold it at arms' length, you did not then take it up?

A. I can only answer in the same way as I did before, that I did not regard the tax title in Mr. Cohen's hands as any more dangerous than in the hands of Mr. Wiltsie.

Q. And although he told you he was going to but it up from Wiltsie and hold it adversely to you?

A. *It was already held adversely to me.*

Again, Webb says (pp. 331, 332):

A. I am not contesting that tax title in this case. I am testing the forfeiture of the lease, and, as I say, when I wish I will take up that question of the tax title with the person who owns it and defend my estate at that time and at my own instance and option.

In paragraph 15 of his answer Webb avers as follows:

"15. Answering the fifteenth paragraph of said bill, this defendant is advised and believes and therefore avers that he can not be compelled to litigate the question of the validity of said tax sale in this proceeding at the instance of the complainant, and that whether valid or invalid, this defendant has the right to deal with the same without reference to the views of the complainant, and to extinguish said tax title in such manner as in his judgment may be best. That this defendant can, without litigation and without expense, secure a release of said tax title and he is advised and believes that it is his duty to the parties in interest to obtain the extinguishment of said tax title by amicable compromise, without imperiling the fee-simple title to said property by litigation over a question of the validity of the same, which, if determined in favor of the validity of said tax sale, will forever extinguish the title of all parties to said property except the defendants Kann. This defendant has not been able to inform himself sufficiently as to the facts and the law to be able to say whether the said tax sale is valid or not, but he is advised and believes and therefore avers that under the statute the said tax deed is made *prima facie* evidence of the regularity of all proceedings for the sale of said property, and that in a litigation affecting the

validity of said sale, the burden would be cast upon this defendant to establish this invalidity, and he denies the right of the complainant to compel this defendant to enter upon such litigation and take the consequences of the result thereof solely for the benefit of the complainant, through whose default, and only through whose default, the said tax title has arisen."

The further proceedings of Cohen after he left Webb upon his doorstep upon the evening of the 30th of September, 1901, are immaterial so far as Webb is concerned. They are given in detail in the testimony, beginning at page 361. They concern only Cohen and the Kanns and Wiltsie, as to the last of whom it appears from the record that he is a person who invests money by the hundred thousand dollars in buying delinquent tax titles in order that he may get 15 per centum per annum upon his money, and, in addition, such sums as he can extort from persons who desire to redeem tax sales.

It is sufficient to say that Cohen procured the return of the certificate from the Washington bank and himself bought it of Wiltsie for $500. He immediately returned to Washington, and on Thursday, October 3, procured a deed for the property. Cohen says explicitly (Rec. p. 370) that he did not see Mrs. Kennedy between the 19th of September and the 3d of October, and that he did not see Webb or any one representing either Mrs. Kennedy or Webb between the evening of the 30th of September and the 3d of October; nor had he communicated with any such person or persons between those days.

Cohen further says, upon the same page, that he did not see Webb until Tuesday, the 8th of October, and does not think that he had communicated with him.

Just in this connection we refer to Exhibit C, filed with the original bill (Rec. p. 20), which contains Mrs. Kennedy's notice to the tenant that she declines to re-

ceive further rent from her, and refers her to her attorney, Webb, for further explanation of her (Mrs. Kennedy's) action in the matter.

From this it will appear that so early as the 1st of October Mrs. Kennedy was taking active steps to forfeit the lease. In fact, on October 4, 1901, she in person signed the regular notice to quit (Rec. p. 440). By some error this notice is dated 1903, but Mrs. Kennedy died in 1901.

A consideration of what occurred thereafter seems to counsel absolutely irrelevant; but inasmuch as one of the reasons for their writing this detailed brief is to reply to the attacks which have been made upon their client, they will briefly consider what happened subsequently to the writing of this letter of Mrs. Kennedy's of October 1.

It appears from the testimony of Cohen (Rec. p. 370) that when he did see Webb, on the 8th of October, he was told by Webb that he (Webb) was considering making a new lease with Mrs. King of the property which she then occupied. It appears from Mr. Webb's testimony (Rec. p. 291) that on the 3d of October Mr. Tobriner called to see him in behalf of Mrs. King, and that sundry negotiations ensued between him (Tobriner) and a Mr. Cahill, also representing the tenant, who called to see Mr. Webb in that capacity on the 5th day of October. Both Tobriner and Cahill wanted to know whether or not the landlord would make a new lease with the Kings.

The next thing that occurred (Rec. p. 291) was that on the 9th of October, Cohen, with his counsel, Mr. W. G. Johnson, came into Webb's office and informed him that the tax certificate was owned by the Kanns, and that they would not surrender it. But Mr. Johnson said that if Webb would get rid of the present tenants and lease the property to them, they would take a lease of $300 a

month and surrender the tax certificate; or, if Webb refused, that they would hold it in hostility to his client, and possibly bring ejectment proceedings against her (Rec. p. 292).

On page 316 Webb says, in this connection:

> A. As I say, this matter was brought to my attention so suddenly that I did not think of the matter afterwards. I did not know Mr. Cohen's object in purchasing this tax title, and I did not ascertain it until Mr. Johnson informed me on the 9th day of October, 1901.

Subsequently a meeting occurred at Dr. Fry's office, to which Mr. Darlington refers in the following question (Rec. p. 319):

> Q. Do you remember one morning, at Dr. Fry's office, about 9 o'clock, you and Mr. Cohen and Mr. Johnson were there, and this same statement (as to the Kanns' then position) was made then?
>
> A. Yes, sir; I think I was.
>
> Q. Did you communicate this threat, as you call it, to Mrs. Kennedy?
>
> A. I had spoken about it to Mrs. Kennedy previously to that.
>
> Q. Please tell us, as nearly as you can, what you told her?
>
> A. I can not give the words.
>
> Q. Give it in substance?
>
> A. The substance is just what I said; that the Kanns had purchased this tax title and offered to surrender it if we would turn over the property to them and take them as tenants.
>
> Q. And that if you would not?
>
> A. If we would not, they would hold it adversely and she must take the consequences.

Prior to this meeting at Dr. Fry's office, and after the 9th of October, Mrs. Kennedy had, in consequence of Dr. Fry's advice, determined to disregard the advice of her counsel, Webb, and to condone the forfeiture and fight

the tax title. In accordance with this, Webb's letter of compromise of October 30, 1901 (Rec. pp. 87–89), was written.

In consequence of the refusal of this offer of compromise, both Dr. Fry and Mr. Webb advised Mrs. Kennedy that her proper course was to enforce the forfeiture and adhere to the compromise of October 9th with the Kanns, which compromise involved the surrender of the tax title, and this was done. The details of what has been so briefly stated will be found, also, in Mr. Cohen's testimony (Rec. pp. 370, 374; also pp. 408, 415).

Acting upon this advice, Mrs. Kennedy, on the 9th day of November, 1901, subscribed and swore to the complaint necessary under the landlord and tenant law to recover possession of her premises (Rec. p. 24); and on the same day (Rec. p. 25) the legal summons was issued against the tenant. These later proceedings may be summed up as follows:

On the 1st of October, Mrs. Kennedy determined, upon the advice of her counsel, Webb, to forfeit the lease, and then notified the tenant to that effect. Thereafter, apparently at the instance of the Kings, she wavered, and at one time had determined to condone the forfeiture and fight the tax title. Thereupon the Kanns, insisting upon their right to a lease upon what they understood to be the agreement with Mr. Webb, notified her that if she did not fulfil that agreement they would assert their tax title against her. In consequence of this notification the compromise with the Kanns of October 9 was made. Subsequently Dr. Fry intervened and the compromise letter of Webb (October 30) was written. Later, this last attempted compromise being rejected by the Kings, Mrs. Kennedy determined, upon the advice of both Dr. Fry and her attorney, Mr. Webb, to forfeit the lease; and proceedings to that effect were instituted. Counsel for Webb confidently claim that no just criticism can be

made against him for his conduct in the matter from its inception to its conclusion.

(f) Webb's motives in advising Mrs. Kennedy to forfeit lease.

Attention is called at the outset to the fact that in so far as Webb knew of Mrs. Kennedy's personal desires, they were to terminate the lease in question (Rec. pp. 317, 351, 352, 354). At page 351 he says explicitly: "One of the principal covenants in the lease had not been kept and I knew that she (Mrs. Kennedy) was anxious to get rid of this lease on account of the term it had to run." Again, at page 354, Webb says explicitly that Mrs. Kennedy was anxious to get rid of this lease. At pages 309, 317, and 355 questions were asked Mr. Webb upon cross-examination implying that, while in his correspondence he was referring to the Kings as dangerous tenants, and, therefore, was anxious to get rid of them, yet in point of fact it was a mere matter of dollars and cents, and he would have been willing to keep them if they had paid more rent. In answer to this it must be said explicitly that Webb's motives for his advice are irrelevant. It was decided by the House of Lords in the case of *Allen* v. *Flood* (1898, A. C. 1), that even where a man maliciously persuades another to leave the employment of a third person, no cause of action arises therefrom against the persuader. It is further said that malice can not convert into an actionable that which is otherwise an unactionable thing.

In so far as the criticism is concerned, it is fair to say that Webb has nowhere said that he would have been willing to advise any new lease to the Kings which would remit to their diligence the payment of taxes on the property. He would have made a new lease with them for a shorter term and for an increased rental. He would not have been willing to entrust the safety of his client's

INSERT.

Additional Authorities on Immateriality of Lessor's Motive in Declaring Forfeiture.

The plaintiff, with the object of bringing about the bankruptcy of the defendant, a codirector, and of having him thereby disqualified and removed from the directorate, took an absolute assignment from the defendant's creditors, with a covenant that the amount of the debts recovered, less costs, should be paid over to the assignors; and notice of the assignment was given to the defendant. Held, that the plaintiff may maintain an action against the defendant for the debts so assigned.

Fitzroy *vs.* Cave, L. T. R., 499 (Eng., C. A., June 9, 1905).

Although the question how far a defendant's motive should determine his liability for causing damage to a plaintiff is involved in much conflict, the courts are harmonious in holding that even the most reprehensible motive does not make him liable for causing the plaintiff to suffer the consequences of the latter's own breach of duty.

See 18 Harv. L. Rev., 411, 412.

Thus, the most vindictive motive does not give rise to a cause of action for ejecting a trespasser or for collecting a debt.

Brothers *vs.* Morris, 49 Vt., 430.
South Royalton Bank *vs.* Suffolk Bank, 27 Vt., 505.

Neither can the motive for suing a trespasser or a debtor furnish a defense to the action.

Jacobson *vs.* Van Boening, 48 Neb., 80.
Bragg *vs.* Raymond, 11 Cush. (Mass.), 274.

And even where the plaintiff, with evil motive, procures an assignment of a mortgage to foreclose it, or becomes a shareholder in order to enjoin a corporation, paramount public policy requires that the court should look at the cause of action alone.

Morris *vs.* Tuthill, 72 N. Y., 575.
Bloxam *vs.* Metropolitan Ry. Co., L. R., 3 Ch., 337, 353.

There is no hardship in compelling a defendant to discharge his obligation, but there is grave danger in permitting him to plead the motive of every creditor who seeks to enforce it.

Additional Authority in Waiver.

Times Co. *vs.* Siebright, 15 Phila., 235.
S. C., 11 W. N. C., 283.

property to them. In his correspondence he has laid the greatest stress upon the defects of the tenants which were brought prominently into view by the forfeiture; that this in any way impeaches his good faith can not fairly be claimed.

(g) Webb is criticised because it is said that he did not give the Kings "another chance" with a new lease (Rec. pp. 309, 355).

The testimony, as hereinbefore referred to, shows that after the 4th of October, when the notice to quit was sent, Webb was considering with Cahill the making of a new lease to the Kings—in other words, the giving of another chance, as counsel for the Kings put it, to the Kings (Rec. pp. 291, 317, 325, 332, 349, 352, 353, 370, 373).

The compromise letter of Webb of October 30, 1901, so frequently hereinbefore referred to, was another such chance (Rec. p. 355).

Counsel for Webb only refer to this in connection with the implied reflections upon his character. That any duty, either legal or moral, rested upon him to give the Kings another chance is denied.

It would, indeed, be most unusual for a landlord, under the circumstances in question, to have any other thought than that of depriving the defaulting tenant of another chance to injure his landlord's property.

(h) Webb is criticised (Rec. p. 310) for relying upon the general statement made by Cohen on September 30, to the effect that the Kanns were willing to renew their offer of some months earlier to take a lease of the premises in controversy.

It is submitted that this criticism is strained. Webb says (Rec. p. 350), in answer to the question:

> "Q. When you went to see Mr. Cohen you went to learn whether you could get this new tenant?

> A. I wanted to be certain, before I advised Mrs. Kennedy definitely to forfeit the lease, that she was in a position to get another tenant."

Again he says, on page 354, "I wanted to be certain I could get a tenant." At page 310 he says that he knew the offer of the Kanns was not binding unless it was accepted. Bearing in mind the fact that the Kanns had some months earlier approached Webb and made the offer in question, he had advised her to forfeit the existing lease on the faith of this offer of the Kanns. The details of the new lease were left for future contract. In our large cities among business and professional men statements of this kind are constantly acted upon and are enforced at law when necessary.

(*i*) *Webb is again criticised in connection with his testimony that he saw no way to prevent Cohen from going to Rochester and purchasing the tax title.*

Just what this criticism means counsel do not understand. In connection with the questions asked Cohen (Rec. p. 359) and the statements made by him with respect to *injunction* and *ne exeat*, counsel for Webb must assume that counsel for the Kings have in mind some litigation that Webb or the Kings might have invoked to prevent the purchase by the Kanns of the tax title in question. If this be meant, the position is an extraordinary one. By the law of the land property is sold for the non-payment of taxes and a certificate is issued to the purchaser at the tax sale. Such purchaser has a legal right to this certificate and to the interest in the real estate given thereby. He can sell it or refuse to sell it. Any third person can by agreement with him purchase it from him. If the Kanns or Cohen or any other person desired to purchase this certificate they had unquestionably a right to do so. That any court by any

writ could have prevented this under the circumstances is inconceivable. Criticism of Webb, therefore, can hardly be based upon his failure to institute litigation against Cohen. If, on the other hand, it be merely meant to criticise Webb because he did not himself go to Rochester or communicate with Wiltsie, by telegraph or otherwise, then the answer to this criticism has been already hereinbefore mades both in the words of Webb and of his counsel.

(*j*) *Webb is criticised because after the 9th of October he cooperated with the Kanns.*

It appears from the record (p. 326) that on the 9th day of October what has been called the "compromise offer of the Kanns" was accepted by Mrs. Kennedy. By this acceptance the tax title was gotten out of the way (Rec. pp. 357, 432). Thereafter Webb consistently acted with the Kanns and their counsel save when he was interrupted by the attempted compromise with the Kings expressed in his letter of October 30, so often hereinbefore referred to. This will be apparent from the testimony at pages 322, 327, 373, 418 of the record.

(*k*) *It may be said that after the compromise with the Kanns on October 9, Webb was writing to the Kings' counsel as if he still thought the tax title a thing of danger.*

In reply it is only necessary to say that Webb did not even then know what action Mrs. Kennedy would finally take. In fact, on October 30, he sent, at her direction, the offer of compromise to the Kings, which would have superseded the Kann compromise and left the tax title to be reckoned with.

We repeat that all of this criticism from the mouth of a defaulting tenant is impertinent, save as an attack on Webb's credibility as a witness.

Allegations of Duress and Threats.

Beginning at page 318, there is a cross-examination continued for pages with respect to alleged threats which induced Mrs. Kennedy to determine to enforce the forfeiture. It appeared indisputably from the testimony that when Mrs. Kennedy, upon the advice of Dr. Fry, had concluded to disregard the advice of her counsel, the defendant Webb, and to condone the forfeiture, the defendants Kann, through their counsel, had stated to her counsel that in that event she would have to fight their tax title. The situation thus presented to Mrs. Kennedy was the choice between two evils. She would either condone the forfeiture and keep, at the same insufficient rental, a tenant who had allowed her property to be sold for taxes and an adverse deed to be acquired, and thus not only lose the Kanns as tenants (who would, upon becoming such tenants at an increased rent, release to her the adverse tax deed), but also have to fight the validity of the tax deed upon her property; or she would accept the Kanns as tenants at the said higher rental, have released to her the adverse tax title and enforce the forfeiture against the Kings, and thus encounter litigation on their part for the remission of said forfeiture.

It would have been just as unreasonable for the Kanns, in case she had determined in favor of the Kings, to say that they had coerced her by threats, as it is for the Kings to say that the Kanns coerced her by threats. Nothing can be plainer than this. Threats, in the meaning of the law, are not the proposal to an interested party of two different lines of action, each of which has advantages or disadvantages, and the insistence by the advocates of each upon his proffered line of action, but the forcing upon a person against his will and interest of

a line of action which is adopted only by reason of the threat, and not by reason of superior advantage to the person to whom it is proposed.

In conclusion, upon this charge of fraud, counsel regret to say that they are unable to understand the foundation upon which counsel for the appellee rest it. Nor can they any more understand why the case of *Michoud et al.* vs. *Girod et al.*, 4 Howard, 554, should be cited in this connection.

Did the lessor have a right to redeem her property from this tax sale? Surely. If she did not choose to redeem it, had she a right to neglect it? Surely. If Cohen determined to buy it, was she under any obligation to interfere? Surely not.

The charge of fraud must resolve itself into these charges:

1. The lessee had a right to redeem.

But under the law she had not.

2. The defendants, Webb, Cohen, and the Kanns conspired to prevent this redemption by Webb's procuring Cohen to buy the tax title.

But this is denied, and not only not proved, but not attempted to be proved, and is, moreover, disproved by the testimony.

But even if it were proved as conclusively as it has been disproved, the fatal gap in the reasoning would recur. The lessor had no right to redeem, and hence a conspiracy to hinder her in that regard would be irrelevant.

But even had she a right to redeem, no legal harm would have been done to her by any such conspiracy; for there can be no conspiracy to do a legal act by legal means.

She had made no contract with Wiltsie, and he was free to sell to any one.

Cohen was free to buy.

Webb was free to buy in the lessor's interest.

If Webb could have persuaded the Kanns to buy the tax title from Wiltsie, and release it to the lessor in consideration of a satisfactory lease to them, what principle of law would have been violated? Where would have been the necessary elements of an illegal conspiracy?

Here was no combination to do an illegal thing, and none for the use of illegal means to do anything.

Question ten must, it is urged, be answered in the negative.

This tenth question is revelant to the fifth, sixth, and eighth assignments of error.

QUESTION XI.

Has Not the Complainant Been Guilty of Such Laches as Disentitle Her to Relief?

The complainant has shown herself guilty of such *laches* in the specific matter in controversy that a court of equity will not relieve her.

1. She has been guilty of *laches* in not ascertaining and discharging her duty to pay the taxes upon the rear portions of the demised premises.

2. She has been guilty of *laches* in failing to pay the taxes accruing upon "sublot A" from December, 1897, to July, 1900, although these taxes accrued annually and occasionally semi-annually during those years.

3. She has been guilty of *laches* in not at once redeeming the premises from tax sale when she had an opportunity so to do.

4. She has been guilty of *laches* in failing to purchase an adverse tax title when during the period of more than eight weeks she had an opportunity of so doing.

These propositions have necessarily been considered in the preceding pages of this argument, and what has been said on these points need not be here repeated. The lessee has clearly been guilty of each and all of these *laches*. This question concerns the seventh assignment of error.

QUESTION XII.

In Any Case Can a Defaulting Tenant Have Relief From a Forfeiture Save on the Condition of Paying All Costs and Reasonable Counsel Fees to the Landlord Incurred in Resisting Such Relief?

The court below erred on the question of costs. In any view of the case, the plaintiff should pay not only the taxed costs, but such costs as the appellant, Webb, has been put to in the retainer and compensation of counsel, payment of stenographers' bills, printing of briefs, and other similar necessary expenses. This is required upon principle, and was explicitly provided for as a condition of relief in the following case relied upon by counsel for the complainant in the court below.

Eichenlaub v. *Neil*, 3 Ohio Dec., 365.

> "The court below decreed that forfeiture be relieved against upon payment of all accrued and unpaid rents and interest thereon, all the costs of the suit and also of the suit before the justice of the peace, and attorney's fees in the sum of $300 to the lessor's attorneys, and such a decree may be drawn, the costs on appeal to be paid by Neil and interest to be computed to the date of the decree below."

This point covers the ninth assignment of error.

If in any case this doctrine should be applied it is in such a case as this. One main point of this litigation is the validity of a tax title. The lower court has at the instance of a defaulting tenant tied the lessor's hands

and deprived her of the power to save herself from the peril in which the lessee has negligently put her. It has gone further and has permitted the lessee to litigate the validity of that tax title at the lessor's peril.

If the lessee gains the cause, the lessor has a dangerous and unreliable tenant on her hands for the balance of the term.

If the lessee fail, then the lessor has lost her property and has only the security of the bond (Rec. pp. 107, 108) to rely on for her indemnity. The penalty of this bond is only $40,000, and the property is said in the testimony of Webb to be worth more than twice that amount. If a man should in any case use every effort to save himself by the retainer of counsel and an appeal to the courts of justice, surely this is such a case. The person whose admitted negligence has caused such expense should in any case make it good.

In conclusion, we respectfully submit that to give relief in the case at bar is to do violence to the law.

As Chief Baron Thompson said in *Bracebridge* v. *Buckley* (*supra*):

> "*It really comes to a question whether in all cases of reentry on breach of covenant a court of equity will do away with the covenant.*"

As Lord Campbell said in *Duke of Beaufort* v. *Neeld* (*supra*):

> "*It would be a disgrace to the law if there could have been such a decision.*"

As Lord Justice Smith said in *Eastern Telegraph Co.* v. *Dent* (*supra*):

> "*I could not bring myself to say that a judge could run his pen through that part of the contract, which is that consent should be asked for, and render it of no effect.*"

As Lord Justice Ray said in *Barrows* v. *Isaacs* (*supra*):

> *"It is impossible not to see that such relief would be an incentive to negligence. If we were to grant it, hereafter lessees might avoid looking at their leases, lest they should be reminded by them of obligations which it would be more convenient to ignore."*

It is respectfully submitted that the decree of the Court of Appeals of the District of Columbia should be reversed on every assignment of error.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
E. S. THEALL,
Counsel for Appellant Webb.

APPENDIX A.

Extract From Platt on Leases, Vol. 2, p. 475.

2. As to relief at law and in equity from forfeiture occasioned by non-payment of rent.

Forfeitures for non-payment of rent have always been regarded unfavorably; indeed so little countenance have they received, that even courts of law, at an early period, assumed the power of relieving the lessee, by staying proceedings in ejectment at any time before execution executed, on payment of the arrears of rent due and all costs (*i*), and, in some cases, on his giving security for future payments (*k*): But the act of the 4th of George the Second abridged their powers in this respect, by providing (*l*), "that if the tenant or tenants, his, her, or their assignee or assignees, do or shall at any time before the trial in such ejectment pay or tender to the lessor or landlord, his executors or administrators, or his, her, or their attorney in that cause, or pay into the court where the same cause is depending, all the rent and arrears, together with the costs, then and in such case all further proceedings on the said ejectment shall cease, and be discontinued."

(*i*) Downes *vs.* Turner, 1 Salk. 597; Goodtitle *vs.* Holdfast, 2 Stra. 900; Philips *vs.* Dolittle, 3 Mod. 345; Duckworth dem. Tubley *vs.* Tunstall, Barnes, 184; Anon. 1 Wils. 75; Archer dem. Hankey *vs.* Snapp, Andr. 341; Roe dem. West *vs.* Davis, 7 East, 363–6; Doe dem. Harris *vs.* Masters, 2 Barn. & Cres. 490; S. C. 4 Dow. & Ry. 45; Pure dem. Withers *vs.* Sturdy, Bull. N. P. 97, 7th edit.; Swanston *vs.* Biggs, 1 Beat. 170; Lovat *vs.* Lord Ranelagh, 3 Ves. & B. 24.

(*k*) Smith *vs.* Parks, 10 Mod. 383.

(*l*) 4 Geo. 2, c. 28, s. 4; 2 Man. & Selw. 531.

The act contains also a provision (*m*), that nothing therein contained shall extend to bar the right of any mortgagee of such lease, who shall not be in possession, so as within six calendar months after such judgment obtained, and execution executed, he pay all rent in arrear, and all costs and damages, and perform all the covenants and agreements which on the part of the first lessee ought to be performed.

An under-lessee is entitled to stay proceedings in ejectment on payment of rent and costs under this act (*n*).

In the case of Goodright *vs.* Noright (*o*), a motion under the statute for setting aside the proceedings in an ejectment with costs was granted, though opposed by the lessor on the ground of his having given instructions to his attorney to bring the action before the tender of the rent.

But the court has refused to relieve after a trial, for that, they said, would be but to exercise the function of legislation instead of judicial construction and to depart from the line which the statute had drawn (*p*); the principle of which determination has received the approbation of succeeding judges (*q*).

The Court of Common Pleas lately refused a motion to stay proceedings in an ejectment for forfeiture for non-payment of rent, made on the ground that an ejectment between the same parties was pending in the Queen's Bench, for an alleged forfeiture for non-payment of rent previously due, as the one action would not necessarily decide the other (*r*).

(*m*) Latter part of sect. 2 of 4 Geo. 2, c. 28; Doe dem. Whitfield *vs.* Roe, 3 Taunt. 402.

(*n*) Doe dem. Wyatt *vs.* Byron, 1 Man. Gra. & Sc. 623; S. C. 3 Dowl. & Lown. 31.

(*o*) Goodright dem. Stevenson *vs.* Noright, 2 W. Blac. 746.

(*p*) Roe dem. West *vs.* Davis, 7 East, 363-6.

(*q*) Doe dem. Harris *vs.* Masters, 2 Barn. & Cres. 490-3; S. C. 4 Dow. & Ry. 45.

(*r*) Doe dem. Henry *vs.* Gustard, 2 Dowl. Pr. Ca. N. S. 615; S. C. 5 Scott's N. R. 818; 4 Man. & Gra. 987.

The application of the statute can not be objected to on the ground of the ejectment being brought for a forfeiture for not repairing, as well as for non-payment of rent. In such cases, the court will stay proceeding as to the rent, on its being paid with costs, and leave the plaintiff to proceed on any other title (*s*).

But a court of common law has no jurisdiction to stay proceedings upon terms, without the consent of the lessor, where the action of ejectment is founded on a forfeiture occasioned only by a breach of covenant to repair (*t*).

Previously to the statute in question, a wider range was taken by courts of equity, where it was usual to relieve the tenant from the forfeiture, on payment of the rent, interests, and costs, whatever interval might have elapsed between the accrual of the debt and the day of payment (*u*). The principle of this supposed equity, that interest and costs sufficiently compensated the landlord for the delay (*x*), has been frequently condemned (*y*): and the injustice of the practice becoming daily more evident, the legislature interposed, and, while it recognized the jurisdiction of equity (*z*), remedied the evil, not by giv-

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(*s*) Pure dem. Withers *vs.* Sturdy, Bull. N. P. 97, 7th edit. And see Anon. 1 Wils. 75. Wadman *vs.* Calcraft. 10 Ves. 69.

(*t*) Doe dem. Mayhew *vs.* Asby, 10 Adol. & Ell. 71; S. C. 2 Per. & Dav. 302.

(*u*) Doe dem Hitchins *vs.* Lewis, 1 Burr. 619. And see Webber *vs.* Smith, 2 Vern. 103; S. C. 1 Eq. Ca. Ab. 115, pl. 14. Hill *vs.* Barclay, 18 Ves. 60. Doe dem. Earl of Jersey *vs.* Smith, 7 Pri. 326; S. C. as in note (*y*), p 493 of Vol. 1, ante, Bowser *vs* Colby, 1 Hare, 109, 125.

(*x*) De Scarlett *vs.* Dennett, 9 Mod. 22. Lovat *vs.* Lord Ranelagh, 3 Ves. & B. 30. And see the cases in the following note (*y*).

(*y*) Hill *vs.* Barclay, 16 Ves. 405; 18 Ves. 58–9; 60–1. Reynolds *vs.* Pitt, 19 Ves. 140. See also Sparks *vs* Liverpool Water Works Company, 13 Ves. 434. Newman *vs.* Rodgers, 4 Bro. C. C. 393; and Bracebridge *vs.* Buckley, 2 Pri. 2?6.

(*z*) Wadman *vs* Calcraft, 10 Ves. 70. Davis *vs.* West, 12 Ves 475–6. Hill *vs.* Barclay 18 Ves. 60.

ing any relief *in specie* (*a*); but merely by limiting the period within which an application might be made, and thus removing the uncertainty to which the landlord had before been exposed from the tenant's privilege of offering compensation at any time, in order to found an application for equitable aid (*b*).

The statute in question, the 4th Geo. 2, c. 28, already quoted, after reciting (*c*) that it often happened that after a reentry made, the lessee or his assignee, upon one or more bills filed in a court of equity, not only held out the lessor or landlord by an injunction from recovering the possession, but likewise pending the suit ran much more in arrear, without giving any security for the rents due when the said reentry was made, or which should afterwards incur, enacted that in case the lessee or lessees, his, her, or their, assignee or assignees, or other person or persons claiming or deriving under the said leases, should permit or suffer judgment to be had and recovered on such ejectment, and execution to be executed thereon, without paying the rent and arrears, together with full costs, and without filing any bill or bills for relief in equity within six calendar months after such execution executed, then and in such case the said lessee or lessees his, her, or their assignee or assignees, and all other persons claiming and deriving under the said lease, should be barred and foreclosed from all relief or remedy in law or equity, other than by writ of error for reversal of such judgment, in case the same should be erroneous, and that the said landlord or lessor should from thenceforth hold the said demised premises discharged from such lease.

The third section of the same statute enacted, that in case the said lessee or lessees, his, her, or their assignee

(*a*) Wadman *vs.* Calcraft, 10 Ves. 70.
(*b*) Doe dem. Hitchings *vs.* Lewis, 1 Burr. 619.
(*c*) 4 Geo. 2, c. 28. s 2.

or assignees, or other person or persons claiming any right, title, or interest, in law or equity, of, in, or to the said lease, should, within the time aforesaid, file one or more bill or bills for relief in any court of equity, such person or persons should not have or continue any injunction against the proceedings at law on such ejectment, unless he, she, or they should, within forty days next, after a full and perfect answer should be filed by lessor or lessors of the plaintiff in such ejectment, bring into court, and lodge with the proper officer, such sum and sums of money as the lessor or lessors of the plaintiff in the said ejectment should in his or their answer swear to be due and in arrear, over and above all just allowances, and also the costs taxed in the said suit, there to remain till the hearing of the cause, or to be paid out to the lessor or landlord, on good security, subject to the decree of the court; and that in case such bill or bills should be filed within the time aforesaid, and after execution should be executed, the lessor or lessors of the plaintiff should be accountable only for so much and no more as he, she, or they should really and bona fide, without fraud, deceit, or willful neglect, make of the demised premises from the time of his, her, or their entering into the actual possession thereof; and that if what should be so made by the lessor or lessors of the plaintiff should happen to be less than the rent reserved on the said lease, then the said lessee or lessees, his, her, or their assignee or assignees, before he, she, or they should be restored to his, her, or their possession or possessions, should pay such lessor or lessors, or landlord or landlords, what the money so by them made should fall short of the reserved rent for the time such lessor or lessors of the plaintiff, landlord or landlords, should hold the said lands.

To entitle himself to relief in equity from a forfeiture occasioned by non-payment of rent, it is not necessary

that the failure in payment should arise from accident, as the miscarriage of a letter with a remittance, insolvency, or disease; but even in cases of negligence, the tenant being solvent, and not prevented by any accidental circumstance, equity will interefere; and, upon payment of the rent and all expenses, will prevent the tenant's being turned out of possession; considering that, in the one case, frequently great hardship might be the consequence; while, in the other, the lessor being placed in the same situation, there is in general no hardship (*d*).

The necessity, however, for paying into court the arrears of rent and the costs arises only where the tenant applies for an injunction by which his possession is to be continued, and the landlord restrained from proceeding with his ejectment. In these cases, if the injunction be granted, the court is bound to impose the particular terms required by the statute for the security of the landlord; but if the landlord be actually in possession, undisturbed by the interposition of the court, and the tenant's first application for relief be made at the hearing of the cause, the statute does not apply (*e*).

In equity, as at law (*f*), the court refuses to connect the right of the tenant to redeem under the statute for non-payment of rent, with any extrinsic matter of waste, or breach of covenant, so as to make the tenant pay compensation for them, as a condition connected with his relief (*g*). Relief will be granted against forfeiture for non-payment of rent, without prejudice to any remedies at law or in equity to which the landlord may be entitled to resort on other accounts. But if breaches of covenants, for which the lessee might be ejected, and

(*d*) Per Lord Erskine; Sanders *vs* Pope, 12 Ves. 282–9. But see as to this principle, ante, p. 477 of this volume.

(*e*) Bowser *vs*. Colby, 1 Hare, 109.

(*f*) Ante, p. 477 of this volume.

(*g*) Davis *vs*. West, 12 Ves. 475. Swanston *vs*. Biggs, 1 Beat. 170.

against which the court could not relieve, be proved, it will not relieve against a breach for non-payment (*h*).

And where, on a trial in ejectment, the lessor was confined by the judge to the proof of one breach of covenant, against which, it seems, equity would have afforded relief, although he was capable of proving other breaches against which no relief could be had, the court refused to continue an injunction against further proceedings under the ejectment (*i*).

Where a lessee suffered judgment by default in an ejectment on a proviso for reentry on non-performance of covenants, without requiring a particular of the breaches on which the lessor intended to rely, and afterwards applied for relief in equity on payment of arrears of rent and costs, and the lessor by his answer alleged that the ejectment was brought for breaches of other covenants, such as to repair, not to assign without license, etc., Sir William Grant decreed that the defendant should be at liberty to bring an ejectment for breach of any of the covenants, except the covenant for payment of rent, reserving further directions; but on the cause coming before Lord Eldon on appeal, his lordship said that the decree was not right in form, for if the court thought it stood also upon the other breaches, and meant to examine them, the course ought to have been of a different nature; an issue to try whether there were any breaches of those covenants, specifying them, that were known to the defendant previously to the ejectment brought (*k*).

But, according to Sir James Wigram, V. C. (*l*), it de-

(*h*) Bowser *vs.* Colby, 1 Hare, 109, 134. Home *vs.* Thompson, Sau. & Scul. 615.

(*i*) Lovat & Lord Ranelagh, 3 Ves. & B. 24.

(*k*) Wadman *vs.* Calcraft, 10 Ves. 67. And see Davis *vs.* West, 12 Ves. 475; S. C. Roe dem. West, *vs.* Davis, 7 East. 363.

(*l*) Bowser *vs.* Colby, 1 Hare, 109, 132.

pends very much, in these cases, on the form and course which the pleadings take, whether the breaches of covenant are to be proved in the cause or tried in an issue.

And the same learned judge also admitted that a case might exist in which a lessee should have also dealt with the property of his landlord, or otherwise so acted as to deprive himself of all right to equitable interference in redeeming his lease, forfeited by non-payment of rent, although no covenant other than that for the payment of rent might have been broken (*m*). At the same time, he disclaimed the proposition that a court of equity was to exercise a merely arbitrary discretion upon this subject, or that the equitable considerations which should deprive the plaintiffs in the cause before him of their right to redeem their testator's lease, must not be such as were capable of being defined, or, at least reduced to a principle (*n*).

Equity will relieve a lessee against a forfeiture of his lease for non-payment of rent, as well where the lease is declared to be void as where a right of reentry is given to the lessor on that event (*o*).

An under-tenant of premises comprised in an ejectment for non-payment of rent brought by the first lessor, may obtain the same relief as his lessor, by filing a bill in equity against such first lessor within six months after execution had, and making the deposits prescribed by the act (*p*).

So, if there be many under-lessees of distinct parts of

(*m*) Bowser *vs.* Colby, 1 Hare, 109, 138.

(*n*) Ibid.

(*o*) Bowser *vs.* Colby, 1 Hare, 109. And see ante, p. 327 et seq. of this volume.

(*p*) Berney *vs.* Moore, 2 Ridgew. P. C. 310. See also O'Reilly *vs.* Fetherston, 4 Bli. P. C. N. S. 161. The language of the Irish Act, 11 Anne, c. 2, is similar to that of the English act, 4 Geo. 2, c. 28. And see Doe dem. Wyatt *vs.* Byron, 1 Man. Gra. & Sc. 623; S. C. 3 Dowl. & Lown. 31.

premises, the original lease of which becomes forfeited for non-payment of rent, any of them may obtain relief, by paying the whole rent, and may compel a contribution from the other under-lessees (*q*).

Where a mesne lessor forfeited his lease for non-payment of rent, and afterwards took a new lease from his lessor, he might compel his under-lessee to accept a new lease from him, for so much of the term of the latter as was unexpired, with the same covenants as were in the old lease (*r*). But the necessity which it would seem formerly existed (*s*) for the grant of a new lease to the tenant on his obtaining relief, was obviated by the 4th section of the act of George the Second (*t*), which provided, that if the lessee, his executors, administrators, or assigns, should upon such bill, filed as aforesaid, be relieved in equity, he or they should have, hold, and enjoy the demised lands according to the lease thereof made without any new lease.

3. As to relief in equity from forfeiture for breach by the lessee of other covenants than for payment of rent.

Whether the relief granted by the courts of equity against forfeiture for breach of covenant for payment of rent should be extended to other covenants, and if so extended, to what covenants it should apply, have been subjects of frequent consideration. Some of the questions have been disposed of with very little difficulty, while others have undergone repeated discussion before the point could be regarded as settled.

It was laid down by Lord Alvanley, then Sir R. P. Arden, M. R. (*u*), as a principle in administering this species of relief; and succeeding equity judges have

(*q*) Webber *vs.* Smith, 2 Vern. 103; S. C. 1 Eq Ca. Ab. 115, pl. 14.

(*r*) Baker *vs.* Olibeare, Freem Ch. 92.

(*s*) Hack *vs* Leonard, 9 Mod. 90. Anon. Freem. Ch. 115, case 129. Baker *vs.* Olibeare, Freem. Ch 92 Bowen *vs.* Whitmore, Freem. Ch. 192.

(*t*) 4 Geo. 2, c. 28, s. 4, 19 Ves. 141.

(*u*) Eaton *vs.* Lyon, 3 Ves. 692-3.

recorded their approbation of the rule (*x*), that if by unavoidable accident, fraud, surprise, or ignorance not willful, a party was prevented from executing his covenant literally, a court of equity would interfere; and, upon compensation being made, would give relief; signifying by the term *compensation*, not uncertain damages to be recovered through the medium of a jury; but a compensation to be estimated and measured by some certain standard of computation, such as interest on a sum of money (*y*).

On this principle, it has been determined that a tenant whose conduct with reference to his covenant has been gross and ruinous has no pretense to relief (*z*). Nor has a tenant who, in violation of his covenant, willfully omits to insure the premises demised (*a*); though he may have expended considerable sums in improvements (*b*); and it is immaterial whether the neglect to insure has been of long or short duration, for in neither case can the court estimate the quantum of risk in damages (*c*).

In like manner, he has no claim to relief, if, in contravention of his covenant, he assign or underlet without consent (*d*). He can not show that by the assignment the

(*x*) See Hill *vs.* Barclay, 16 Ves. 402; S. C. 18 Ves. 56. Rolfe *vs.* Harris, 2 Pri. 206, n. Bracebridge *vs.* Buckley, 2 Pri. 215. And see particularly cases of relief against neglect to apply for a renewal, ante, vol. 1, p. 751.

(*y*) Sanders *vs.* Pope, 12 Ves. 291, 292, cites Wafer *vs.* Mocato, 9 Mod 112. Reynolds vs. Pitt, 19 Ves. 142; S. C. 2 Pri. 212, n. But see Bowen *vs.* Whitmore, Freem. Ch. 192.

(*z*) Hill *vs.* Barclay, 16 Ves. 404; 18 Ves. 62-3. Bracebridge *vs.* Buckley, 2 Pri. 224-5.

(*a*) Rolfe *vs.* Harris, 2 Pri. 206, n. Reynolds *vs.* Pitt. 212, n. S. C. 19 Ves. 134. Bracebridge *vs.* Buckley, 2 Pri. 218.

(*b*) White *vs.* Warner, 2 Meriv. 459. Green *vs.* Bridges, 4 Sim. 96.

(*c*) Cases sup.

(*d*) Wafer *vs.* Mocato, 9 Mod. 112; Wadman *vs.* Calcraft, 10 Ves. 67; Hill *vs.* Barclay, 18 Ves 63; Lovatt *vs.* Lord Ranelagh, 3 Ves. & B. 31; Bracebridge *vs.* Buckley, 2 Pri. 200, 221. And see Northcote *vs.* Duke, Ambl, 511; S. C. 2 Eden, 319; Davies *vs.* Moreton, 2 Ch. Ca. 127.

lessor sustains no damage; that, on the contrary, he, the lessee, is a beggar, who can not pay the rent, and the assignee a solvent tenant, and that the lessor is, therefore, in a better condition, having two persons answerable to him instead of one. The answer is, that the court can not estimate the damage. The fact, as it is alleged, may be true at the moment, but the consideration, whether the lessor is to gain or lose by having a tenant put upon him, must run through the whole continuance of the lease. It is sufficient that the lessor insists upon his covenant, and no one has a right to put him in a different situation (*e*).

Relief has also been refused where the lessee carried on a trade prohibited by the covenant (*f*). So, again, where he suffered a way to be used over the demised lands contrary to his covenant, although he offered compensation in damages. The breach, said Sir Joseph Jekyll, can not be estimated in damages. It tends to the prejudice of the inheritance, as it may hereafter amount to an evidence for a prescription over the close (*g*).

It seems that the court will relieve upon a breach of covenant to cultivate a farm in a particular way, provided the injury arising from it be inconsiderable (*h*).

And in an early case (*i*), the lessee was relieved from a forfeiture occasioned by his cutting down great trees, and a reference was directed to the master to ascertain the amount of damage, though it may well be questioned whether relief would now be afforded under similar circumstances.

The right to relief from forfeiture occasioned by omission to repair has not been settled so easily, as will ap-

(*e*) Per Lord Eldon, 18 Ves. 63.

(*f*) Macher *vs.* The Foundling Hospital, 1 Ves. & B. 188.

(*g*) Descarlett *vs.* Dennett, 9 Mod. 22; approved of in Sanders *vs.* Pope, 12 Ves. 291; and in Bracebridge *vs.* Buckley, 2 Pri. 221.

(*h*) Lovat *vs.* Lord Ranelagh, 3 Ves. & B. 24. See particularly p. 30.

(*i*) Bowen *vs.* Whitmore, Freem. Ch. 192.

pear from the number and *conflicting nature of the* cases on the point. Covenants relating to repairs are of two kinds, first, those by which the lessee engages generally to repair, and keep in repair, the premises during the term; and, secondly, those by which he engages to lay out a stipulated sum on repairs within a given time. We will examine these two kinds separately, to ascertain whether there is any difference between them, so far as the interposition of equity is concerned.

As to the first kind:

That equity would interpose in favor of the lessee about a century and a half ago is proved by the case of Webber *vs.* Smith (*k*), where a lessee for years at a certain rent, and under covenants to repair, made a hundred under-leases; and the premises not being repaired, nor the rent paid, a reentry was made, and the original lease avoided. Six of the under-lessees were plaintiffs against the head landlord and first lessee. The court said that they could not make any decree to apportion the head landlord's rents, nor relieve the plaintiffs, but on their payment of the whole rent in arrear, and repairing all the premises; but that having so done, they might compel the rest of the under-tenants to contribute.

Parker, C., also relieved a lessee from a forfeiture occasioned by non-repairing, observing that he could not apprehend what damage the administrator of the lessor could sustain if the lessee suffered the buildings to be out of repair, so as he kept the main timber from being rotten and left all in good repair before the end of the term. It was, therefore, referred to a master to see what damage, if any, was done for non-performance of covenants, and at what time, etc (*l*).

Sanders *vs.* Pope (*m*) is the only other instance of a

(*k*) Webber *vs.* Smith, 2 Vern. 103; S. C. 1 Eq. Ca. Ab. 115, pl. 14.

(*l*) Hack *vs.* Leonard, 9 Mod. 90.

(*m*) Sanders *vs.* Pope, 12 Ves. 282. And see Davis *vs.* West, 12 Ves. 475.

forfeiture for not repairing being deemed a subject for equitable relief. The point, it is true, arose on a covenant to lay out a specific sum on repairs within a given time; but it is not difficult to glean from Lord Erskine's judgment that his opinion was in favor of relief, though he thought that such a case might be one of very complicated consideration and much detail as to what would put the party in the same situation (*n*). He dissented from Lord Alvanley's limited rule in Eaton *vs.* Lyon (*o*); and declared, that if the covenant were broken with the consciousness that it was broken, if it were willful, not by surprise, accident, or ignorance, still if it were a case where full compensation could be made (and he considered it could be made on a breach of covenant to repair), the authorities said, not that it was imperative upon the court to give relief, but that there was a discretion (*p*). But he did not hold that under all circumstances a tenant would be justified in neglecting to repair, and applying to equity as of course, offering to put the landlord in the same situation; on the contrary, he thought that, if any vexation appeared, the court might refuse to interfere (*q*).

The authority of these decisions, however, has been repeatedly impugned, as we shall find by an examination and comparison of the other cases on the subject.

With regard to Webber *vs.* Smith (*r*), Lord Eldon said, that though both reports represented the relief to be upon undertaking to do the repairs, yet he was not informed how the relief was actually to be given, nor what became of it; that probably nothing more was

(*n*) 12 Ves. 290.
(*o*) Ante, p 483 of this volume.
(*p*) 12 Ves 292-3.
(*q*) Radcliffe *vs.* Warrington, 12 Ves. 334.
(*r*) Ante, p. 485 of this volume.

done (*s*); and Baron Richards declares that he could not understand the case (*t*).

Hack *vs.* Leonard (*u*), too, has been disapproved of by Lord Eldon, who denominated it a loose note (*x*); and by Baron Richards, who said that he could not see the ground of the decision (*y*).

Nor has Sanders *vs.* Pope escaped condemnation. In the earlier case of Wadman *vs.* Calcraft (*z*), Lord Eldon and Sir Wm. Grant, M. R., evidently took for granted, as a general position, that no relief could be afforded against a forfeiture for not repairing. But soon after Lord Erskine's decision, the case of Hill *vs.* Barclay (*a*) arose, where the tenant had covenanted to lay out £150 within a given time; to keep the premises in repair and leave them in repair at the end of the term; that it should be lawful for the lessor twice a year to enter and survey the premises, and to require the necessary repairs to be done within three calendar months; and a right of reentry was reserved on breach of any of the covenants. It appeared also (*b*) that the lessor had called for the repairs to be done within three months, by which (it may be noticed) he dispensed with his right of entry under the general covenant (*c*). The tenant neglected to repair until the ejectment was brought, and, under these circumstances, Lord Eldon refused to relieve him from the consequences of his default. When the case first came before the court, he inclined to think that considerable arguments might be urged against the relief given in

(*s*) Hill *vs.* Barclay, 16 Ves. 406

(*t*) Bracebridge *vs.* Buckley, 2 Price, 215.

(*u*) Ante, p. 485 of this volume.

(*x*) In Hill *vs.* Barclay, 18 Ves. 61.

(*y*) Bracebridge *vs.* Buckley, 2 Price, 215.

(*z*) Wadman *vs.* Calcraft, 10 Ves. 67. And see 16 Ves. 403.

(*a*) Hill *vs.* Barclay, 16 Ves. 402; S. C. 18 Ves. 56. And see Hannam *vs.* South London Water Works Company, 2 Meriv. 61–67.

(*b*) 18 Ves. 64.

(*c*) Doe dem. Morecraft *vs.* Meux, 4 Barn. & Cres. 606.

Sanders *vs.* Pope, but upon its coming on for judgment, on a motion to dissolve the injunction, he considered that it was not governed by that case, and distinguished it by the circumstance of the dealing by request and refusal between the lessor and lessee, which, in Sanders *vs.* Pope, had not occurred in the period during which, by the express covenant, the money ought to have been applied (*d*).

The Vice Chancellor (Sir Thomas Plumer) in Rolfe *vs.* Harris (*e*) has entered his protest against Lord Erskine's decision, saying that it was founded rather on dicta than authorities, and went further than the authorities warranted; while Baron Richards has declared that it did not give satisfaction to Westminster Hall (*f*). On the other hand, it is right to mention that Baron Wood, in the last case cited, noticed the determination in terms of unmingled praise.

Under these circumstances, we may perhaps safely conclude that it is no longer an authority that equity will relieve in general cases of breaches of covenants to repair.

One of the grounds of Lord Erskine's judgment (*g*), and which had been previously adopted by Parker, C., in Hack *vs.* Leonard (*h*), that if the premises, under a covenant always to be kept good, were repaired at the close of the term, the landlord would have his property in better condition from their not being repaired sooner, was strongly animadverted on by Lord Eldon (*i*), who said that the court was surely not authorized so to deal with contracts; and that it was taking a prodigious liberty with a contract by which the tenant had under-

(*d*) 18 Ves. 59. And see 16 Ves. 406.
(*e*) Rolfe *vs.* Harris, 2 Pri. 206, n.
(*f*) Bracebridge *vs.* Buckley, 2 Pri. 219.
(*g*) 12 Ves. 294.
(*h*) 9 Mod. 91.
(*i*) Hill *vs.* Barclay, 18 Ves. 62.

taken forthwith to repair, and to keep the premises in repair constantly, in order that the landlord might during the whole currency of the term have the property, if returned upon his hands, in exactly the state he intended; that if this doctrine could be maintained in general cases, what was to be said of the case, where, the court administering this species of equity, the tenant had become bankrupt before the end of the term, the assignees refused to take the lease, and the premises were thrown back to the lessor in a state of utter non-repair? Would that, said he, be anything like an execution of the contract? (*k*).

Secondly, comes the question, whether a covenant to lay out a specific sum in repairs within a limited time, is regarded with greater indulgence.

In the early case of Barker *vs.* Holder (*l*), the lessee covenanted to expend £200 on the premises within ten years, and, on failure, and after the expiration of thirty years the lessor brought an action on the covenant and recovered damages; but the court, although it admitted the hardship of the case, refused to relieve the lessee, either by mitigating the damages, or decreeing the amount to be laid out on the premises.

The covenant in the case of Sanders *vs.* Pope (*m*), so often referred to, was also of the like kind, viz, to lay out, before the end of the first five years of the term, the sum of £200 in substantially repairing and improving the premises; the lease also contained a proviso for re-entry on non-performance. Lord Erskine took express notice of the distinction between a general covenant to repair and a covenant to expend a certain sum in repairs within a definite time; and considered it (among

(*k*) And see a similar remark made by Richards, B., in Bracebridge *vs.* Buckley, 2 Pri. 218.

(*l*) Barker *vs.* Holder, 1 Vern. 316; S. C., 1 Eq. Ca. Ab. 28, pl. 5.

(*m*) Sanders *vs.* Pope, 12 Ves. 282.

other reasons) as furnishing particular ground for equitable interposition.

Though it is not altogether easy to collect from the report of Hill *vs.* Barclay what was Lord Eldon's opinion of the decision in Sanders *vs.* Pope under the peculiar circumstances of that case, some of his remarks being unfavorable to it (*n*), while others apparently acknowledged its propriety (*o*), still it is apprehended that the general tenor of the judgment indicates a disinclination on his lordship's part to allow to the lessee under the one covenant greater claims to relief than under the other. But the more recent determination in Bracebridge *vs.* Buckley (*p*), where all the previous authorities were reviewed, seems to set that point at rest. The case came before the Court of Exchequer on a bill by a tenant to be relieved from the forfeiture of his term incurred by a breach of covenant to lay out £1,000 in repairs within twelve months from the commencement of the demise; and, after great length of discussion, the bill was dismissed by Thomson, C. B., and Barons Graham and Richards, against the opinion of Baron Wood, principally on the ground that there were no means of ascertaining what compensation should be made to the landlord, or the mode of making it if ascertainable.

Sanders *vs.* Pope, therefore, seems to be overruled on this point also.

The distinction taken by Lord Eldon in his judgment in Hill *vs.* Barclay on the circumstance of notice or request and refusal, and before adverted to (*q*), being advanced by counsel, and urged as a ground for relief in Bracebridge *vs.* Buckley, the Chief Baron, supported by

(*n*) See Hill *vs.* Barclay, 16 Ves. 403.

(*o*) S. C., 18 Ves. 59. And Baron Wood's observations in Bracebridge *vs.* Buckley, 2 Pri. 234-5.

(*p*) Bracebridge *vs.* Buckley, 2 Pri. 200.

(*q*) Ante, p. 487 of this volume.

Baron Graham (*r*), said that, as the lessee in the former case had covenanted to make the necessary repairs within a certain time, no demand was necessary; and that a neglect of performance was tantamount to a refusal at law (*s*).

Whether notice was necessary in the case of a general covenant to repair, without any specification of time, was left untouched; but it may be mentioned that Sir Thomas Plumer (*t*) and Sir L. Shadwell (*u*) have severally expressed their opinion that no notice is necessary on a covenant to insure.

On the whole, it is submitted that relief against forfeitures incurred by breaches of covenants to repair, generally, or to lay out a specified sum in repairs within a certain time, will not be granted, unless the omission and consequent forfeiture be the effect of unavoidable accident, fraud, surprise, or ignorance not willful (*x*); or unless the landlord stand by and look on (*y*); or unless a refusal to interfere would, from a peculiar combination of circumstances, be attended with considerable hardship and injustice to the tenant. A case of the kind last mentioned occurred some few years since (*z*). The plaintiff, a lessee, with a right of perpetual renewal, and subject to a covenant to repair, and a proviso for reentry on non-performance, contracted with the Vauxhall Bridge Company for the sale of his interest in the premises, on receiving a notice from them to deliver up possession, which they were empowered by act of parliament to require for the purposes of the company. The lessors, the South London Water Works Company, were

(*r*) 2 Pri. 228.
(*s*) 2 Pri. 213, 230.
(*t*) Rolfe *vs.* Harris, 2 Pri. 206-9.
(*u*) Green *vs.* Bridges, 4 Sim. 96.
(*x*) Eaton *vs.* Lyon, 3 Ves. 692-3. Hill *vs.* Barclay, 18 Ves. 62.
(*y*) Hill *vs.* Barclay, sup.
(*z*) Hannam *vs.* South London Water Works Company, 2 Meriv. 61.

also negotiating for the sale of their reversion. Pending their treaty, the property was destroyed by fire; the landlords brought an action of ejectment, and the plaintiff filed his bill for an injunction. Under these circumstances, it was directed that execution should be stayed till further order, with a view to see if the parties could come to an agreement; and on the matter being again brought on, the court declared that, attending to the treaties, and to the provisions of a certain act of parliament therein mentioned, as they might affect those premises, and also to the possibility of the effect which the powers of the Vauxhall Bridge Company must have upon the plaintiff's strictly performing all the covenants in his lease, it was reasonable that the injunction should be granted; and, therefore, upon payment by the plaintiff to the defendants of their costs at law, it was agreed that an injunction should be awarded to restrain the defendants (the South London Water Works Company) from further proceeding in their action of ejectment, until the hearing or further order; the plaintiff paying his rent for the premises from time to time as it should become due, and undertaking to obey such orders as the court should think proper to make.

One more case remains to be noticed, where the court relieved the tenant of a lunatic's estate, on payment of all expenses, from an ejectment brought by the committee for not repairing, on the ground that it would be an administration in lunacy extremely prejudicial to the estates of lunatics if too hard measures were adopted with the tenants (*a*).

(*a*) Ex parte Vaughan; In the matter of Eldridge, 1 Turn. & Russ. 434.

APPENDIX B.

6 Ohio Decisions, Reprint, p. 556 (American Law Record, Vol. 8, p. 496).

FORFEITURE-PLEADING

SUPERIOR COURT OF CINCINNATI, SPECIAL TERM, 1880.

Force, Harmon, and Foraker, JJ.

BALDWIN *vs.* HENRY I. REES, ET AL.

1. A denial that the plaintiff "lawfully entered," or is in "lawful possession," or that the defendant "has committed any breach of covenant, so as to work a forfeiture," is not a traverse of any allegation of fact, but only a denial of the legal effect of alleged facts.
2. Lessee, after a perfected forfeiture, can not call for an account to inform him how much he has omitted to pay, in order to enable him to make a tender.
3. After forfeiture and reentry, for breach of covenant to pay taxes, equity will not relieve against such forfeiture.
4. If the lessor purchases a valid tax title to the leased land, so as to be seised of a different estate, yet if he makes peaceable entry and becomes fully possessed of the premises, his possession is lawful and entitled to protection.

FORCE J.: The petition avers that, in 1847, one Luther Rose leased to one Sidney Warner Pease, for ninety-nine years, renewable forever, certain described premises, in which lease it was covenanted that the lessee and his representatives would pay all taxes and assessments, and

in case of failure, the lessor or his representatives could enter and forfeit the lease and be repossessed of his former estate; that by various mesne conveyances the plaintiff became the owner of the reversion and of all the right and interest of the reversioner in the lease; that the defendant, Rees, became by assignment the owner of the leasehold, and as such went into possession; that taxes were not paid, and the land was sold by the auditor for such unpaid taxes; that the purchaser paid taxes for several years subsequently, and then sold and assigned his right to the plaintiff, who was then the owner of the reversion; that the auditor of the county, by tax deed, conveyed the premises to the plaintiff; that thereafter, the plaintiff, for breach of covenant, entered upon the premises, forfeited the lease, took possession of the entire premises, and has remained in quiet possession thereof ever since; that the various defendants deny his right and set up claims to interest in the premises; whereupon plaintiff prays to be quieted in his title and possession.

Defendant, John E. Rees, files an answer denying that the plaintiff lawfully entered or is in lawful possession; denying that the lessee or any of his assigns committed any breach of covenant so as to forfeit the lease, or did any act so as to forfeit the lease; averring that he does not know the amount of taxes unpaid, asking for an account so that he may tender the amount properly due, and to have relief against forfeiture, if any has accrued, and by way of cross-petition, claimed that he holds a mortgage upon the leasehold and praying for foreclosure. The defendants claim liens of various sorts upon the leasehold and file cross-petitions to have the leasehold sold to satisfy them.

Plaintiff demurs to Rees' answer and to the various cross-petitions.

It is clear that the denials are only denials of the legal effect claimed by the plaintiff as growing out of alleged facts; they traverse no allegations of fact, but only deny conclusions of law. They constitute no defense and are bad on demurrer.

The defendant is not entitled to an account of the amount of unpaid taxes to enable him to make a tender. The wrong done by omitting to pay taxes in violation of the covenant does not give a right to call for an account. It is his business to know.

But if the amount due on account of unpaid taxes were perfectly ascertained, defendant could not relieve the forfeiture by making tender of it. Non-payment of taxes is not like non-payment of rent; it puts in jeopardy the estate of the lessor, and equity does not relieve against a forfeiture efected for such a breach.

The fact that the estate of the lessee is encumbered does not affect the right of the lessor. By reentry upon forfeiture, the revisioner becomes seised and possessed of his former estate. The leasehold perishes, and incumbrances upon it, its feliage and fruit, perish with it.

It is true that no one can forfeit the lease but him who is seised of the estate of the lessor; and ownership by tax title obtained from the State after the State has forfeited for non-payment of taxes, is a different estate from that of the lessor. For the lien of the State for taxes rests not upon any estate, but, penetrating through all estates, rests upon the land itself, and hence the State, by a forfeiture, takes the land divested of all previous States. The State, when it subsequently conveys, creates a new fee simple, and confers a title free from all claim but thecontingency of the State's eminent domain.

But this does not affect the plaintiff's right to be quieted. If there was a valid forfeiture by the State and

conveyance to the plaintiff, while he could not then forfeit under the lease, for the lease and the estate of lessor and reversioner had gone out of existence, yet he is in possession under a clear title, against which the defendants have no claim. If the forfeiture for taxes and the tax title are invalid, then plaintiff purchased only a tax lien and was seised as lessor, and is in possession seised of his original estate. In either case he is entitled to the relief he demands.

The demurrer to the answer and cross-petition of Rees is sustained. For the same reason, the demurrer to the cross-petitions of the other defendants are sustained.

Yaple, Moos, and Pattison, for plaintiff.

Tilden, Buchwalter & Campbell, and Jordan, Jordan & Williams, for defendants.

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Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. [redacted]17

HENRY RANDALL WEBB, APPELLANT,

vs.

CAROLINE KING.

Argument in Behalf of Webb, Appellant.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
E. S. THEALL,

LAW REPORTER PRINTING CO., WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1905.

No. 203.

HENRY RANDALL WEBB, EXECUTOR,

vs.

CAROLINE KING.

Argument for Appellant, Henry Randall Webb.

We venture to say that this is one of the most extraordinary cases that was ever brought to the attention of a court of justice. The complainant, a lessee, has broken her covenant (under penalty of forfeiture) to pay taxes on the demised premises. In consequence of this breach the property was, on April 13, 1899, for default in payment of taxes due in May, 1898, sold by the taxing power, and a deed in fee subsequently issued to the defendant Cohen for the benefit of the defendants Kann. Nevertheless, the lessee has succeeded in getting from a court of equity an injunction to prevent the lessor from retaking possession of the demised premises. She has also virtually enjoined the lessor from making a new lease to the purchasers of the tax title, who were willing to take the premises at an increased rental, and to surrender to the lessor the tax title. She has, also, in the same suit, successfully litigated the validity of this tax title with said purchasers, at the risk of the lessor, and has been relieved from the forfeiture.

Whether these things, or any of them, can properly be done is the question that now comes before this court.

This is a bill in equity, filed by Caroline King, complainant and assignee of a lessee, against Marianne A. B. Kennedy, lessor, Meyer Cohen, Sigmund Kann, and Louis Kann. Mrs. Kennedy having died, her attorney and devisee, Henry Randall Webb, and her heir at law, Maria Gillis Dewey, were, by bill of revivor, made parties defendant.

The facts of the case are these:

On July 8, 1890, Mrs. Marianne A. B. Kennedy, then about 69 years of age, leased premises numbered 719 Market Space in this city to the complainant's husband for three years. The rent reserved was $2,400 annually. In addition to this the lessee covenanted to pay all repairs and taxes under penalty of forfeiture. The lessee was at that time carrying on and continued to carry on a millinery business on Seventh street.

On December 27, 1892, this lease was extended for five years on the same terms.

On October 8, 1896, when Mrs. Kennedy was 75 years of age, this lease was extended for ten years, without any increase of rental.

The complainant admits in her bill that there has been a slight increase of rental value (Rec., p. 5.)

The proof is that the defendants Kann are willing to pay an increase of $1,200 yearly and also to pay taxes and repairs.

It is urged in the brief that this old lady, while not incompetent to contract, was nevertheless not on an equal footing with the lessee in these renewals, especially the last one, and was overreached by the lessee, and that therefore the lessee or his assignors are not entitled to the favorable consideration of a court of equity in again imposing upon the lessor an unequal burden from which the negligence of the lessee has discharged her.

In 1901 her memory had become so impaired that she forgot that up to the death of the original lessee she had herself paid the taxes and been reimbursed by him; she so informed her attorney, and on the faith of this he subsequently made a mistaken averment in this regard in his answer to the bill (Rec., p. 78).

The lessee urges as a special equity some improvements made during the lease upon the demised premises. These were apparently the taking away the old side entrance on the first floor, and making some improvements on the first and second floors (Rec., pp. 154, 178.) These improvements were so insignificant that the complainant has not ventured to give their cost.

During the life of the original lessee the lessor herself paid the taxes and collected the amount thereof from the lessee. The correspondence between the parties, showing their course of business in this regard, will be found in the record (pp. 166–168, 197, 276–279).

Henry King, jr., the original lessee, died August 15, 1897 (Rec., p. 2).

He left a will, the contents of which are not relevant to this litigation.

His son, Harry King, was appointed administrator *c. t. a.*, and on August 25, 1897, he filed a petition to the Probate Court asking leave to sell to the complainant the lease in question and also the lease of the Seventh street shop, together with certain stocks of goods, horses, wagons, &c. belonging to the estate of the original lessee, for $3,500 cash (Rec., p. 208). In this petition he averred that this lease was of no practical value, and swore that it had seven years less than its true term to run. Upon this petition a sale was made as prayed, and the complainant became the assignee of the unexpired term of the lease in question.

Within a year the creditors of the lessee filed a creditors' bill against his estate, charging fraud in the dispo-

sition of his assets. On June 24, 1901, an amended bill of complaint was filed (Rec., p. 215), charging fraud and perjury in the sale to the complainant of the lease in question.

On August 12, 1901, Harry King filed an answer (Rec., p. 219) to this amended bill, in which he defended this sale, averring that this and the other leases were of no value and liable to forfeiture (Rec., p. 220). It appears from a stipulation of counsel (Rec., p. 481) that this creditors' bill was heard on bill and answer, and that a decree of sale was made of the assets of Harry King, jr., but not including the lease in question.

After the purchase of these assets from Harry King, administrator *c. t. a.*, a partnership or association was formed between the complainant and her sons for carrying on the same business which the original lessee had conducted, both at the premises in question and also at another shop on Seventh street. The parties interested in this business were the complainant and her sons, Harry King, Joseph King, and Abe King (Rec., pp. 190–196). Of this business Harry King was the manager, the complainant taking little or no part in it (Rec., pp. 187, 194). For years before the death of the original lessee, his son Harry King was his father's general manager (Rec., pp. 184, 193). This history is given for the purpose of showing that Harry King is the real complainant in this case, and that for years prior to his father's death, and from that time on, in the name of Caroline King & Sons, he had managed this business and attended to all of its details. Bearing these facts in mind, we go back to the death of the original lessee in August, 1897.

In November, 1897, a semi-annual instalment of taxes became due, the first to accrue after the assignment of the lease. This tax was paid by check of the complainant to the collector of taxes for $139.34, dated December 30, 1897 (Rec., p. 169). Why the complainant

directly paid this tax is attempted to be explained by the testimony of Joseph King (Rec., p. 154).

> "Q. On this occasion did she (lessor) say anything about him as a tenant—on this occasion in December, 1897? A. Yes, sir; she spoke very highly of him and also said he had always paid his rent prompt and everything.
>
> Q. She spoke of that on this occasion? A. Yes, sir.
>
> Q. What did she say about taxes on that occasion? A. She told me she had neglected to notify us in reference to the taxes, and if we wouldn't have them paid, and I said I would go up and tell my brother and notify him at once; that she needn't worry, it would be attended to.
>
> Q. Did you notify your brother? A. Yes, sir; I went that night and told my brother, Mr. Harry King.
>
> Q. That is the only occasion you recall that she discussed taxes with you? A. Yes, sir."

If true, this shows Mrs. Kennedy's purpose not to continue the practice which had theretofore prevailed with the original lessee, but to require strict performance of the covenant to pay taxes by the new tenant.

When Joseph King was sworn, it did not appear that he had any direct interest in this controversy. But the testimony of Harry King (Rec., pp. 193–196) disclosed that the complainant and her sons, Harry, Joseph, and Abraham, were all virtual partners in the business carried on upon these premises. The controversy here being between the personal representative of the dead lessor on the one hand and the assignee of the lessee on the other, the surviving party could not testify to any conversation with the deceased (sec. 1064, District Code). While Joseph King was not a party of record, nevertheless the spirit of the rule excludes him from testifying as to any conversation between the deceased lessor and himself. He testified (Rec., p. 154) that a few days be-

fore Christmas, 1897, the lessor came into the premises in question and told him that she had neglected to give notice about the taxes due in November, 1897, and asked him to pay them. He told her in reply that he would notify Harry King and have them attended to. Harry King testified (Rec., p. 168) that when the lessor's request was communicated to him by Joseph King he paid these taxes.

Thereafter no one paid any taxes until July, 1900, when Harry King, of his own motion, sent the witness Rogers to the tax office to make inquiries and pay taxes due (Rec., pp. 126, 171, 188). From December, 1897, to July, 1900, the lessee, through Harry King, entirely neglected the payment of taxes (Rec. pp. 187, 188). It is testified to absolutely by Harry King (Rec., p. 188) that the lessor never wrote to him about these taxes or made any verbal demand upon him for their payment. This is in most marked contrast with her course of business for many years with the original lessee. She always herself paid the taxes, and at once wrote to him for their repayment. During the latter years of his father's life these letters must have come to Harry King as business manager for his father. Yet from December, 1897, when he paid these taxes at the lessor's request, he paid no taxes, made no inquiry, although he must have known that he was not refunding to the lessor any money paid by her for taxes, and took no action until July, 1900, when he awoke to his duty and without suggestion from any one sent to the tax office to pay taxes. When he found that they had not been paid he made no comment to the lessor, but paid them himself. Most significant of all, his bill in this case contains no hint that the tax sale complained of was made because he was deceived by anything that the lessor had done to his prejudice by misleading him in consequence of her own payment of taxes during the life

of the original lessor, although as business manager of his father these facts must have been most familiar to him. In his correspondence with the lessor no complaint is made on this score. It comes as an afterthought when the stress of his case requires it. Only one deduction is justified by those facts, and it is this: that when Mrs. Kennedy visited the shop in December, 1897, and saw Joseph King, she told him that thereafter the lessee would have to pay the taxes in accordance with the covenants of the lease.

During the intervening years from December, 1897, to July, 1901, Harry King was intimately acquainted with tax sales and tax redemptions. Judge Barnard and he were receivers of his father's estate. Their course of dealing with this estate is evident from his testimony. The necessities of the estate compelled frequent defaults and frequent redemptions from tax sales (Rec., pp. 134, 136, 137, 186, 192). See especially Harry King's letters to Wiltsie (a purchaser at tax sales) under date of September 21, 1901 (Rec.. p. 56).

In July, 1900, without suggestion from any one, Harry King apparently awakes to a consciousness of his covenant and sends the witness Rogers to the tax office to pay taxes on this lot. The testimony of Rogers is to the effect that he asked for all back taxes on this lot in July, 1900, and again in May, 1901, and paid all bills that were given him at the tax office. A careful reading of this witness's testimony, involving his self-contradictions and his explicit contradictions by an uncontradicted witness (Miss Lydie Addison, Rec., pp. 452–459), will, we think, satisfy the court that Rogers was not telling the truth and that his testimony must be disregarded. In July, 1900, Rogers paid only the tax for the current year, 1900 (see cheque, Rec., p. 279). But Harry King must then have known that he had paid nothing since December, 1897, and he admits that he knew it (Rec.,

pp. 187, 188), although he says he did not charge his mind with it. His ledger showed that these taxes had not been paid (Rec., pp. 146, 147), and he could not have looked at it without finding out this fact. Nothing further was done until May, 1901, when again Rogers went to the tax office. It was then too late to redeem the sale of April 13, 1899, which had become irredeemable on April 13, 1901 (see tax deed, Rec., pp. 18–20). Rogers then paid $385.39 (Rec., p. 284), which included redemptions from tax sales, save the sale of April 13, 1899, which could not be redeemed.

Nothing further occurred until July 24, 1901, when one Wiltsie, of Rochester, N. Y., wrote to the complainant a letter calling her attention to the fact that he had bought the premises at a tax sale in April, 1899, and that the sale had become irredeemable in April, 1901 (Rec., p. 285).

A careful reading of this letter by the court is requested. The urgency of the case is emphasized by Wiltsie. He writes that unless a reply is made within ten days he will take title to the property. He requests that if Mrs. King is not interested she will give him the name and address of some interested party.

Neither when he got this letter nor at any subsequent time did Harry King make any complaint to the lessor that she had failed to do her duty as to these taxes or had misled him in any way. He concealed from her all knowledge of the sale and of this correspondence with Wiltsie. This correspondence was protracted by Harry King until October 2, 1901. During this time he wrote about this urgent matter three letters, as follows: July 30, 1901 (Rec., p. 173); August 10, 1901 (Rec., p. 174), and September 21, 1901 (Rec., p. 80). This correspondence is set forth in sequence in the appellants' brief (pp. 77–84), and a reading of it will satisfy the court how culpably negligent Harry King was when he had an

opportunity to correct the consequences of his own neglect of covenant duty. Not only would he not do this himself, but he concealed from the lessor the danger of the situation and trifled with this danger while she was ignorant of its existence. Is it credible that he would have then made no complaint to her if her conduct had in any way involved him in the then serious situation?

Now from the inception of this lease down to the end of September, 1901, we have no act of the lessor which in any way misled the lessee or his assignee, the complainant.

The continued defaults in the payment of taxes by Harry King from December, 1897, to July, 1900, were absolutely his own fault.

The failure to redeem from Wiltsie from July 24 to September 30, 1901, was confessedly due to Harry King and to him alone. All of the defendants were entirely ignorant of these transactions between Wiltsie and Harry King (Rec., pp. 47, 61, 67, 80, 81).

This being the case it is not conceived how the subsequent events averred in the bill of complaint can be material or pertinent.

However, they must be considered.

The following admirably succinct account of the subsequent events is borrowed from the brief of Mr. Johnson, attorney for the defendants Cohen and Kann.

On the 19th or 20th of September, 1901, one Charles H. Knight informed the defendant, Louis Kann, of the aforesaid irredeemable tax sale, under the impression that said Kann was the occupant of the property, and said Kann informed Knight he was not the occupant and referred Knight to the defendant, Webb, as the counsel of the owner, Mrs. Kennedy (Rec., pp. 65, 447–8). Subsequently Kann informed his counsel, defendant Cohen, of Knight's visit and communication, but nothing further

was said or done by either the Kanns or Cohen with respect to the tax sale (Rec., pp. 358–9).

At this time Knight was wholly unknown to the defendants, Kann, Cohen, and Webb (Rec., pp. 447–8, 359, 286).

On the 25th of September, Knight called upon Webb and informed him of the tax sale (Rec., pp. 286–7), which information Webb verified the next day, the 26th, by an examination of the tax records, and also discovered that the tax sale had become irredeemable by lapse of time (Rec., p. 287). This was Webb's first knowledge of the fact of the tax default and sale (Rec., p. 293).

On the 26th of September, 1901, after his investigation at the tax office, Webb informed his client, Mrs. Kennedy, of the fact of the tax default and sale and of her legal right to terminate the lease, leaving her to decide upon her course of action (Rec., pp. 79, 287, 348–50, 356).

On the 27th of September, 1901, which was a Friday (Rec., p. 287), being about to leave the city, and not having previously cautioned his client not to receive rent if she decided to enforce the forfeiture, Webb wrote her to that effect (Rec., pp. 287, 307, 348). He then went to New York (Rec., pp. 287, 348) and returned to his office on Monday morning, September 30, 1901 (Rec., pp. 287, 348), and found there a letter from Mrs. Kennedy, dated Sunday evening (Rec., pp. 287, 307, 308, 348).

That letter concludes thus:

> "You say I must not receive the rent, which he will probably send me by mail on Tuesday morning—but I don't see how I can refuse it unless I know when I am to get another tenant" (Rec., p. 308).

Webb understood this as an instruction from his client to seek another tenant in the place of the Kings (Rec.,

pp. 80, 308–9, 350), and that same morning called upon the defendant Cohen, the counsel of the Kanns, to inquire if the Kanns would rent the property (Rec., p. 287), the Kanns having previously, in June, 1901, intimated a willingness to rent the property at $300 per month (Rec , pp. 287–8, 305–6). At this interview Webb informed Cohen that the Kings had failed to pay the taxes, and that the consequent forfeiture of the lease was to be enforced by his client, Mrs. Kennedy (Rec., pp. 311, 360).

Cohen thereafter conferred with his clients by telephone (Rec., p. 360), and about 1 o'clock the same day informed Webb of the Kanns' reply, that they would agree to take the property at the higher rental, provided possession were given and their agreement would not be used to compel the Kings to pay a higher rent (Rec., pp. 287, 311–12, 350–1, 360–1).

At this interview Webb, in course of conversation, informed Cohen that Wiltsie was the purchaser at the tax sale and that the sale had become irredeemable by lapse of time (Rec., pp. 95, 360, 361). Cohen then suggested to Webb, that he, Webb, buy the tax sale certificate from Wiltsie, to which Webb replied there was no necessity for his, Webb's, purchasing it, whereupon Cohen jestingly remarked, "I believe I'll buy it," and Webb responded, "Don't do that ; don't add that complication," or words to that effect (Rec., pp. 95, 328–9, 360–1). At this time Cohen had no idea of buying the tax sale certificate, and his remark was made entirely in jest (Rec., p. 361).

The same day, about 4.30 p. m., Webb informed his client, Mrs. Kennedy, of the willingness of the Kanns to rent the property upon the terms reported by Cohen, and advised her to enforce the forfeiture (Rec., pp. 288, 311, 348). Mrs. Kennedy acquiesced in this advice, and instructed Webb to inform her physician and friend, Dr. Fry, thereof, and of her decision to enforce the forfeiture,

which instructions Webb carried out that same afternoon (Rec., pp. 80, 324).

In the meantime, upon consideration, the idea of buying the tax sale certificate, which Cohen had, in jest, suggested to Webb he would do, impressed him more favorably, and between 3 and 4 o'clock that afternoon he had a conference with the Kanns, in which he suggested that they allow him to buy the tax sale certificate and hold it for their benefit. After consideration of the matter, the Kanns left it to Cohen's discretion to purchase the tax sale certificate or not, agreeing to furnish the necessary funds and to stand by the transaction, should he so decide (Rec., pp. 43, 44, 66, 67, 361, 362).

After leaving Dr. Fry's house (Rec., p. 324), Webb went to his own home, reaching there about 6 o'clock, and found the defendant Cohen and his partner, Adolph G. Wolf, on his doorstep awaiting admission (Rec., pp. 288, 312, 324, 364).

Cohen then informed Webb that he, Cohen, was going that night to Rochester to purchase the tax sale certificate from Wiltsie, saying that they were then dealing at arm's length (Rec., pp. 288, 324). Webb expostulated with him, but Cohen was positive and insisted upon going and executing his project (Rec., pp. 312, 313, 324, 325, 364).

Cohen left by the midnight train, arriving in New York the next morning, October 1, 1901, and reaching Rochester at about 3.20 p. m. the same day (Rec., pp. 366–7). The same day, October 1, 1901, Mrs. Kennedy, in execution of the advice previously given by her counsel, the defendant Webb, wrote and sent her notice to the Kings, refusing the rent sent by the Kings on the 30th of September and announcing the forfeiture of the lease (Rec., pp. 7, 20, 176, 177).

The letter is as follows:

"*1630 R. I. Ave., Oct. 1, 1901.*

"To Mrs. H. King, Jr.:

"I have only learned within the last few days that you have forfeited your lease of premises 715 Market space by neglecting to pay the taxes and allowing the property to be twice sold at tax sales.

"The lease being thus vitiated, and by advice of my attorney, I must decline receiving any further rental from you.

"For fuller explanation of my action in the matter, I refer you to Mr. H. Randall Webb.

"M. A. B. Kennedy" (Rec., p. 177).

Upon receipt of this letter, on the morning of October 2, 1901, before banking hours, Harry King consulted his counsel about it (Rec., p. 178), then called upon Webb and after some conversation on the subject asked Webb if he objected to his going to see Mrs. Kennedy. Upon being informed by Webb that he did object and that King must transact his business with him, Webb, King says he told Webb he would go to Mrs. Kennedy and did go to her house and attempt to see her, but she denied herself to him (Rec., pp. 179–80).

At 2 o'clock p. m. of the same day, October 2, Cohen received at Rochester the tax certificate from Wiltsie's clerk assigned to himself (Rec., pp. 18, 369) and left at 2.30 p. m. for Washington by way of New York City, arriving here the morning of October 3 (Rec., p. 369). The same day a deed was executed by the authorities of the District conveying the property to Cohen and was at once recorded (Rec., pp. 18–20, 370).

Between the 24th of July, 1901, and the 30th of September, 1901, the correspondence already referred to had taken place between the Kings and Wiltsie with respect to the tax default, but of which all the defendants were entirely ignorant (Rec., pp. 47, 61, 67, 80, 81).

It will be recollected that on the 24th of Septem-

ber, 1901, Wiltsie's clerk wrote, offering to settle at a reduction of $25, concluding thus:

> "Believing that you will accept this offer, I have today sent these papers to the Central National Bank of Washington, with receipt on you for $272.90, where they will be open to your examination, and payment can be made. Please call at the bank *upon receipt of this letter and take up the papers promptly*" (Rec., pp. 175–6).

King did not reply to this letter nor do anything in pursuance of it (Rec., p. 176), until October 2, 1901, *after* he received Mrs. Kennedy's letter of the 1st notifying him that she had terminated the lease because of the Kings' failure to pay the taxes, and of their allowing the property to be sold at tax sale (Rec., p. 177).

He then attempted to take up the tax sale certificate by payment at the bank, but it was too late, as the certificate had been returned to Wiltsie the day before (Rec., p. 179).

The first knowledge that defendant Cohen had of the fact that this tax sale certificate had been sent to Washington for redemption, or that the Kings had had any opportunity to redeem it, was when he was informed by Wiltsie, in Rochester, on the afternoon of October 1, 1901 (Rec., pp. 47, 61, 368–9), and was not known to defendant Webb until after the 3d of October, 1901 (Rec., pp. 80, 81, 332).

On October 4, 1901, Mrs. Kennedy executed and had served upon Caroline King a formal notice to quit and surrender up possession of the property (Rec., pp. 349–350, 353, 474–5).

Between the 2d and 8th of October, 1901, the complainant, through her son and counsel, endeavored to effect a compromise settlement of the forfeiture incurred by which the forfeiture would be waived and the lease maintained, but without success (Rec., pp. 179–80, 21).

On the 9th of October the defendants Kann, through their counsel, informed the defendant Webb, as counsel for Mrs. Kennedy, of their ownership of the tax title in hostility to her, and offered to compromise the same and surrender the tax title if his client would give them possession of the property under a long lease, for which they would pay a net increase rental of $1,200 per annum over that fixed by the forfeited lease; that otherwise they would stand upon their legal rights under the tax title, which she must attack at her peril (Rec., pp. 291–2, 318, 372).

Webb submitted this proposition to Mrs. Kennedy and she accepted it, which fact Webb communicated to counsel for the Kanns on the 10th of October (Rec., pp. 319, 320, 326, 373).

Nevertheless, the Kings, through their counsel, made further efforts, principally by correspondence, with the defendant Webb, to effect a compromise of the forfeiture of the lease, beginning on the 12th of October (Rec., pp. 22–3) and extending to the 30th of October (Rec., pp. 22, 86–89, 294–5, 428–9). As shown by the correspondence itself, no basis of agreement was reached, and the matter culminated on November 1, 1901, in the withdrawal, by counsel for the Kings, of their previous proposition, the rejection of that tendered by defendant Webb, and their declination to enter into any compromise (Rec., pp. 89–91).

On November 9th Mrs. Kennedy signed and duly executed, before Rutledge Wilson, a notary, the complaint in a landlord and tenant proceeding against Caroline King for possession of the leased premises, which was duly filed by defendant Webb, and a summons issued the same day (Rec., pp. 24–5, 349, 353).

The trial of this proceeding was fixed for the 5th of December, 1901 (Rec., p. 10), and on the 4th of December, 1901, the original bill in this cause was filed by Caroline King against Mrs. Kennedy, the Kanns, and Cohen (Rec.,

p. 1), and a temporary restraining order issued (Rec., p. 25). On the same day Mrs. Kennedy died (Rec., p. 27), and on March 7, 1902, a bill of revivor was filed reviving the cause against her executor, the defendant Webb, and against Maria Gillis Dewey, her alleged heir at law (Rec., pp. 26–29). On the 4th of April, 1902, a supplemental bill was filed (Rec., pp. 29–31).

The bill of revivor and the supplemental bill are merely formal, to meet the requirements of equity practice, and involved no change in the case made by the original bill.

All the defendants answered and the cause came on for hearing on the pleadings, on complainant's motion for injunction *pendente lite*, and on June 28, 1902, an injunction *pendente lite* was granted against the defendant Webb (Rec., p. 106). From this order the defendant Webb appealed to the Court of Appeals of the District of Columbia (Rec., p. 108), and said order was, by that court, affirmed on January 20, 1903 (Rec., pp. 112–13). Thereafter the testimony of the parties was taken, and on June 30, 1904, the cause came on for hearing upon the pleadings and evidence, and the final decree was entered, from which appeals were successively prosecuted to the said Court of Appeals and to this Honorable Court (Rec., pp. 482–4).

Discussion of Legal Questions.

1. *Will a court of equity relieve against a forfeiture incurred by tenant's breach of covenant to pay taxes where, in consequence of the breach, a third party has acquired title at tax sale?*

We will postpone a consideration of the question of relief granted by courts of equity in cases of fraud, accident, or mistake. In England forfeitures for non-payment of rent were formerly granted by courts of law, as well as by courts of equity. Since the Act of 4 George II,

abridging the powers of law courts in this respect, relief has been granted in equity mainly. Relief was granted in this case because legal interest is generally full compensation for the mere withholding of money due. But when you pass this line you get beyond the relief, because the law can not estimate the damage of a breach. When we turn from covenants to pay rent to covenants to repair, not to assign, to pay taxes, and to insure (to mention the more important only), we see at once the difference in consequences resulting in a breach from any of them as contrasted with a covenant to pay rent. You have a right to refuse to lease your property to a tenant unless he covenants to insure, or to pay taxes, or to repair, or not to assign. If he violates this covenant you lose the benefit of it, and the consideration of your contract is, in part, gone. If you hire a domestic servant and he steals from you, the law gives you the right to terminate the contract of service. Because he pays back to you the money he has stolen, he does not for that reason acquire a right to have you retain him for the balance of the stipulated term. The law does not force you to retain in your service a dishonest servant. Neither does it force you to retain a dangerous tenant.

If a tenant does not pay you rent, he merely deprives you of the use of money. Interest is legal compensation for this delay. But if he does not insure your house, you are in danger of losing that house through fire. If he does not pay your taxes you are in danger of losing not only your house, but your ground too. It is true that your house may not have burned down. It is true that your land may not have been in fact sold for taxes, or it may have been sold, yet the particular tax sale may be invalid. The next one, however, may be valid. It is not right that you should be forced to keep the tenant who has exposed you to this danger and to run the risk of his exposing you to future dangers from similar breaches.

The law in England upon this point is well settled. It is discussed in the brief (pp. 16–48). The leading English case on the subject is that of—

Rolfe *vs.* Harris, 2 Pri., 206 (220) n.

This case has been followed in—

White *vs.* Warner, 2 Merivale, 459.
Green *vs.* Bridges, 4 Simmons, 96.
Reynolds *vs.* Pitt, 19 Ves., 134.
DeScarlett *vs.* Denett, 9 Mod., 22.
Wafer *vs.* Mocatto, 9 Mod., 112.
Wadman *vs.* Calcraft, 10 Ves., 67.
Hill *vs.* Barclay, 18 Ves., 63.
Bracebridge *vs.* Buckley, 2 Pri., 200.

The only confusion that exists with respect to the general doctrine was introduced by Lord Erskine's decision in the case of Sanders *vs.* Pope, 12 Ves., 282. This case, however, was overruled in the case of Bracebridge *vs.* Buckley (supra). In Bigelow's "Overruled Cases" it is included in the list as having been denied in the case of Swanton *vs.* Biggs, 2 Molloy, 14–16. In the note to the report of Sanders *vs.* Pope, 12 Ves., 294, the reporter says:

> "That the authority of the principal case has been very much shaken, see ante, note 2, to Eaton *vs.* Lyon, 3 Ves., 690. See, also, the notes to Williams *vs.* Cheney, 3 Ves., 59; and the note to Wadman *vs.* Calcraft, 10 Ves., 67."

The case of Sheets *vs.* Selden, 7 Wall., 416–422, decides that the English rule upon the subject is settled by the case of Bracebridge *vs.* Buckley. While in this case of Sheets *vs.* Selden, it is said that the general question is unsettled in the jurisprudence of this country; never-

theless, that case would seem to settle it for this court. At page 421 the court say:

> "The grounds upon which a court of equity proceeds are, that the rent is the object of the parties, and the forfeiture only an incident intended to secure its payment; that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete. In respect to other covenants pertaining to leasehold estates, where the elements of fraud, accident, and mistake are wanting, and the measure of compensation is uncertain, equity will not interfere. It allows the forfeiture to be enforced, if such is the remedy provided by the contract. The rule is applied to the covenant to repair, to insure, and not to assign."

In this country the case of Bacon *vs.* Park, 19 Utah Rep., 46, is directly in point. In that case, as in the case at bar, there had been a sale for non-payment of taxes which the tenant had covenanted to pay. The sale, however, had not culminated in an adverse tax title. The court say:

> "The plaintiff was aware of the covenants in the lease relating to forfeiture. He knew that default had been made in the payment of taxes for several years (the deficit for taxes amounting to about four thousand dollars), and that the premises had been sold for the non-payment of the same, and that the time to redeem had nearly expired; yet he did not intend to redeem until the last day. Such intention and such delay was a gross violation of the covenant of the lease. The evidence shows that Mr. Park (the owner of the premises) was in straitened circumstances. His property was in danger of being sacrificed for the non-payment of taxes. *By forfeiting the lease he ascertained that he could raise the money necessary to redeem the property by releasing the same. It would have been reckless on his part to let such an opportunity pass, and it was absurd*

> *for the plaintiff to expect that the lessor would not assert his right of forfeiture for the non-payment of taxes until the last day for redemption of the same from the tax sale.* Equity will not relieve against a forfeiture of a lease where the breach of the covenants has been so culpable, long persisted in, and detrimental as the evidence in this case shows the breaches to have been."

The case of Baldwin *vs.* Reese, et al., printed as Appendix B to the main brief, and decided by Judges Force, Harmon, and Foraker, holding the Superior Court of Cincinnati, and reported in American Law Record, vol. 8, 496, is also directly in point upon the direct question here concerned. The court said:

> "The defendant (tenant) is not entitled to an account of the amount of unpaid taxes to enable him to make a tender. The wrong done by omitting to pay taxes, in violation of the covenant, does not give a right to call for an account. It is his business to know. But if the amount due on account of unpaid taxes were perfectly ascertained, defendant could not relieve the forfeiture by making tender of it. Non-payment of taxes is not like non-payment of rent; *it puts in jeopardy the estate of the lessor, and equity does not relieve against such a forfeiture.*"

Certain cases cited on the other side are considered in full in the appellant's main brief (pp. 35–38). These cases all rest upon the decision of the Superior Court of the city of New York in the case of Garner *vs.* Hannah, 6 Duer., 262. Many of these cases also rest upon the English overruled case of Sanders *vs.* Pope (supra). Neither the main case of Garner *vs.* Hannah nor any of the other cases consider at all the radical difference between a covenant to pay rent and a covenant to pay taxes. None of them are reasoned, and they can not be considered as anything more than sentimental decisions

INSERT.

After the brief and argument of the appellant Webb had been printed and filed, his counsel received in due course of publication the advance sheets No. 6 of Volume LXIX of the Lawyers' Reports Annotated. At page 833 will be found a note covering the whole subject of forfeiture, to which counsel respectfully refer the court. They desire to especially call the attention of the court to the case of Gordon *vs.* Richardson, 185 Mass., 492, which is directly in point. The Supreme Court of Judicature of Massachusetts, in a unanimous opinion, declined to follow the decision of the Court of Appeals of the State of New York in the case of Giles *vs.* Austin (supra). In the opinion the English cases of Peachy *vs.* Duke of Somerset (supra); Hill *vs.* Barclay (supra); Reynolds *vs.* Pitt (supra); Bracebridge *vs.* Buckley (supra), and Green *vs.* Bridges (supra), are cited and approved. The court in their opinion point out that the breach of a covenant to pay rent is a very different thing from the breach of a covenant to pay taxes. At page 493, the court say:

> "In this case the defendant entered for breach of the covenant to pay taxes, as well as for breach of the covenant to pay rent. When he exercised his right of reentry, in September, 1902, not only was the tax for 1900 not paid, but the estate of the defendant had been sold because of the plaintiff's failure to pay this tax as he had covenanted to do. The defendant's estate had been sold to pay this tax in the June preceding the September when the defendant entered on the estate. The thing here in question, secured by the right of reentry, not only has not been performed, but it can not be performed now. The tax for 1900 has been paid and no longer can be paid by the plaintiff. The tax was paid to the collector by the application thereto of the proceeds of the tax sale. *There is a right to redeem this tax title, but the tax has been paid, and the thing secured by the landlord's right of reentry can no longer be performed by the tenant. By the very terms of the covenant secured by the forfeiture, any performance of it is at an end, and that is the end of the plaintiff's application for relief from the forfeiture in the case at bar.*
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> "Moreover if it were permissible to look behind the terms of the covenant here in question to what might be termed its true nature and sub-

not assert his right of forfeiture for the non-payment of taxes until the last day for redemption of the same from the tax sale. Equity will not relieve against a forfeiture of a lease where the breach of the covenants has been so culpable, long persisted in, and detrimental as the evidence in this case shows the breaches to have been."

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> "Moreover if it were permissible to look behind the terms of the covenant here in question to what might be termed its true nature and substance the plaintiff would gain nothing. *If you look beyond its terms, the real substance and nature of a covenant to pay taxes assessed on the demised premises is to protect and hold harmless the landlord's estate.* When the breach of the covenant has reached the stage where the land-

lord's estate has been sold to pay the taxes which the tenant should have paid, and through the default of the tenant a paramount outstanding title has come into existence, *we have a breach of covenant for which the plaintiff fails to show that compensation can be made. It is like the breach of a covenant to insure or repair* where equity does not ordinarily grant relief against forfeiture of the tenant's estate. Mactier *vs.* Osborn, 146 Mass., 399, 402. Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56 (*overruling Lord Erskine's opinion in Sanders* vs. *Pope, 12 Ves., 282, which never went to a decree, p. 294*). Reynolds *vs.* Pitt, 19 Ves., 134. Bracebridge *vs.* Buckley, 2 Price, 200. Green *vs.* Bridges, 4 Sim., 96.

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"But that view did not prevail. It is settled that in case of waste (Peachy *vs.* Somerset, 1 Stra., 447), in case of a breach of a covenant to make repairs (Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56; Bracebridge *vs.* Buckley, 2 Price, 200), and in case of the breach of a covenant to insure (Reynolds *vs.* Pitt, 19 Ves., 134, Green *vs.* Bridges, 4 Sim., 96), it being impossible for the tenant to show affirmatively that compensation can be made, relief ordinarily will not be given. It was this which C. Allen, J., had in mind in Lundin *vs.* Schoeffel, 167 Mass., 465, 469, when he said of the case then before the court that it 'was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, non-repair, or non-insurance."

It appears from the note already referred to (69 L. R. A., pp. 833–865) that although the mere declaration of the forfeiture will not of itself destroy the power of equity to afford relief (in cases of accident, etc.), yet that is an important step towards the assertion of the rights of the obligee, and where he has taken the necessary steps to reassert his title at law, the obligor must make a stronger case to entitle himself to relief.

The authorities in support of this principle are cited under paragraph VIII of the article referred to. In the

determined to relieve against forfeiture at the expense of well settled principles of law and fundamental rights of contract.

As opposed to the lax utterances of these cases on the general principles of the law of forfeiture, reference is made in the main brief to the following cases, and at pages 39 to 48 of that brief they are fully considered:

Clark *vs.* Barnard, 108 U. S., 436.
Klein *vs.* Insurance Co., 104 U. S., 88.
Thompson *vs.* Insurance Co., 104 U. S., 252.
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Skinner *vs.* Dayton, 2 Johns. Ch., 526.
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Dunklee *vs.* Adams, Adm., 20 Vermont, 415.
The Ottawa Northern Plank Road Company *vs.* Murray, 15 Ill., 336.
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Hukill *vs.* Guffey, 37 W. Va., 425.
People's Bank *vs.* Mitchell, 73 N. Y., 406.
Parsons *vs.* Smilie, 97 Cal., 647.

Counsel confidently contend that upon this first point they are overwhelmingly supported by reason and authority.

2. *Is such breach one that can be compensated to a landlord?*

This question is considered in the main brief at pages 48 to 57. Reference is made to the following cases:

Hand *vs.* Suravitz, 148 Penna. St., 202,
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equity does not ordinarily grant relief against forfeiture of the tenant's estate. Mactier *vs.* Osborn, 146 Mass., 399, 402. Hill *vs.* Barclay, 16 Ves., 402, and 18 Ves., 56 (*overruling Lord Erskine's opinion in Sanders* vs. *Pope, 12 Ves., 282, which never went to a decree, p. 294*). Reynolds *vs.* Pitt, 19 Ves., 134. Bracebridge *vs.* Buckley, 2 Price, 200. Green *vs.* Bridges, 4 Sim., 96.

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The authorities in support of this principle are cited under paragraph VIII of the article referred to. In the case at bar the bill is filed by the tenant to enjoin proceedings at law by the landlord to regain possession of the demised premises after a forfeiture declared by the landlord. It will be noted in the case of Gordon *vs.* Richardson that the case of Sanders *vs.* Pope (supra), is referred to as having been overruled.

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Hand *vs.* Suravitz, 148 Penna. St., 202,
Rector, etc., of Trinity Church *vs.* Higgins, 48 N. Y., 532.

And also the following English cases:

Hill *vs.* Barclay (supra).
Rolfe *vs.* Harris (supra).
Green *vs.* Bridges (supra.
Reynolds *vs.* Pitt (supra).
Bracebridge *vs.* Buckley (supra).

It appears from these cases that in such a case as the one at bar the covenant of the tenant to pay the taxes is recognized as giving to the landlord a contract right which he can not be deprived of, and for the non-fulfilment of which compensation in a legal sense can not be made to him. In the Pennsylvania case the court say:

> "In the case in hand the defendant distinctly agreed that his lease might be forfeited for such non-payment (of water rent). He could have avoided it by paying the bills."

In the New York case (Trinity Church) the court say:

> "The covenant is broken when the defendant neglects to pay taxes or assessments duly imposed. The defendant is not at liberty to say that it is the debt of the plaintiffs. Let them first pay it and I will repay them. It is his own debt, made so by the terms of his covenant. . . . It was, doubtless, to guard against the contingency of a sale of the premises by the city corporation, to obtain payment of the sums assessed, that the covenant was inserted in the lease. *The sale of the premises would involve a loss of the security for the rent reserved, and probably of the reversion.*"

In the case of Hill *vs.* Barclay (supra), Lord Eldon said:

> "It is sufficient that the lessor insists upon his covenant, *and no one has a right to put him in a different situation.*"

In the same case Lord Eldon said, in answer to a suggestion that the lessor was no worse off by reason of the breach of a covenant to repair if the repairs were, in fact, made before the close of the term:

> "*The court is surely not authorized so to deal with contracts.*"

In the case of Rolfe *vs.* Harris (supra) Vice-Chancellor Plumer said:

> "In this very sort of case, too, how can we, when a risk has been run, estimate the *quantum* of that risk in damages? This is such a breach of covenant as is out of the measurement of damages; and the effect of giving the relief prayed would be that any tenant may hereafter break this special covenant with impunity, and every landlord must be content to take his tenant for his insurer for want of power to enforce his covenant."

In the case of Green v. Bridges (supra), Vice-Chancellor Shadwell said, with respect to a breach of covenant to insure:

> "In this case the landlord could not, by any payment of money, be put into the same situation as he was entitled to be under the covenant."

In the case of Reynolds *vs.* Pitt (supra), Lord Eldon said:

> "Upon what principle is a court of equity to say that a tenant who has so neglected to fulfil his contract shall insist that the landlord shall keep all the terms with him as if he had duly performed it?"

In the case of Bracebridge *vs.* Buckley (supra), Richards, baron, said:

> "If not done within the given time the contract is not performed. The lessor can not call on this court to compel the lessee to perform the con-

tract; and why should the lessee call on the lessor to forego it?"

Thompson, chief baron, said in the same case:

"It really comes to a question whether, in all cases of reentry on breach of covenant, a court of equity will do away with the covenant."

3. *Must the landlord in such case make any demand upon the tenant before declaring a forfeiture, and, if so, for what?*

The doctrine of the law is that where a demand would be useless it is not necessary.

Heard *vs.* Lodge, 20 Pick., 53.
Wilstach *vs.* Hawkins, 14 Ind., 541.

The covenant in question was to pay the taxes. When the lessor first learned in the case at bar of a breach, not only had the taxes not been paid, but a tax sale had been made and had become irredeemable. Therefore, a demand on the tenant to pay the taxes would have been useless. But there was no necessity for a demand. Even with respect to the demand for rent, the only reason why this was necessary was because a distress could be justified only by a demand.

Davis *vs.* Burrell et al., 10 C. B., 822.

It has been explicitly decided in the following cases that no demand is necessary for the performance of a collateral covenant:

Bracebridge *vs.* Buckley (supra).
Rolfe *vs.* Harris (supra).
Green *vs.* Bridges (supra).
Baldwin *vs.* Rees (supra).
Bacon *vs.* Park (supra).
Byrane *vs.* Rogers, 8 Minn., 247,
Garner *vs.* Hannah (supra).

The main case upon which opposing counsel rely is that of Jackson *vs.* Harrison, 17 Johnson, 66, decided in 1819. In this case there is no citation of authority or discussion of principle, and the court evidently confused demand for rent with demand for collateral covenants. This case of Jackson *vs.* Harrison was expressly disapproved in the year 1857 in the case of Garner *vs.* Hannah (supra).

The case of Meni *vs.* Rathbone, 21 Ind., 454, rests upon the same case of Jackson *vs.* Harrison. The case of Eichenlaub et al. *vs.* Neill, 3 Ohio Dec., 365, reviews a large number of decisions and concludes that the cases above referred to can not be held to settle the question in this country as to the necessity for a demand.

The *dictum* of Mr. Justice Miller, in the case of Kansas City Elevator Company *vs.* Union Pacific Railroad Company, 3 McCreary, 463, was without citation of authority and was apparently, from his own language, very hasty. This subject is discussed in the main brief at pages 57 to 65, and we think that it is very conclusively shown, both upon reason and authority, that no necessity for a demand exists.

4. *Such a covenant imposes upon the tenant the duty of paying the taxes as they become due.*

Rector, etc. *vs.* Higgins (supra).
Hand *vs.* Suravitz, 148 Pa. St., 207 (supra).
McFarlane *vs.* Williams, 107 Ill., 42.
Ricou *vs.* Hart, 47 La. Ann., p. 1373.
Allen *vs.* Dent, 72 Tenn., 680.

5. *The effect of the action of the lessee in herself paying the taxes down to a certain date is considered in the brief at pages 68 to 84.*

This question has already been considered in the argument upon the facts. In this connection counsel call

attention to the case of Thompson *vs.* Insurance Co., 104 U. S., 252. The question is one of fact mainly, and has already been discussed. It may be concisely resumed as follows:

1. While the lessor during the original lessee's life herself paid taxes on the premises, she regularly collected them through letters to the original lessee.

2. She stopped this when the original lessee died in August, 1897, and thereafter paid no taxes, although she did not die until December, 1901. During all those years there was not a single letter written by her to the complainant asking a refund of taxes. There can be no doubt that when the lessor in December, 1897, had a conversation with Joseph King, she told him that thereafter the tenant must pay the taxes direct. The tenant did pay the taxes direct in December, 1897. Harry King's testimony (Rec., 187–188), shows conclusively that he knew that he was expected to pay the taxes. He voluntarily and of his own motion sent to pay them in July, 1900, and again in May, 1901. His own ledger shows that they were not paid between December, 1897, and July, 1900. He had received no demands during that time from the lessor for reimbursement for taxes paid by her, although prior to that her written demands were regular. When he learned in July, 1900, that the taxes had not been paid, he made no comment upon it to her. When in May, 1901, he had redeemed and paid heavy penalties for tax sales, he again made no comment or complaint to her. When in July, 1901, he learned from Wiltsie that he had to redeem a tax sale made in April, 1899, and while he was wasting two months in haggling over a small sum of money with Wiltsie, he again made no complaint to the lessor. When he filed his bill in December, 1901, no reference was made to the subject, although the whole matter had been thus repeatedly called to his attention and was absolutely within his own knowledge. In addition to that,

it appears that Harry King, during these years, had made defaults in the payment of taxes upon other property belonging to his father's estate, and had had to redeem tax sales from this very man Wiltsie, so that he was thoroughly conversant with these matters, and was, moreover, negligent with respect to them, either from inattention or want of pecuniary means. Moreover, the correspondence with Wiltsie set forth in the brief, at pages 76 to 84, showed his method of dealing with this subject after it had come to his knowledge that the property had been sold for taxes and that the sale had become irredeemable. In the meantime, during his negotiations with Wiltsie, he was not only making no complaint to the lessor, but was keeping her in absolute ignorance of the dangerous situation.

6. *The complainant has been lacking in diligence.*

How little diligent in the premises the complainant has been appears from the testimony next hereinbefore referred to, showing that she not only neglected her covenant duty for more than two years, but also was most negligent in attempting to repair, as far as she could, the very dangerous consequences of that prior negligence.

7 and 8. *Was the Court of Appeals right in allowing the complainant to litigate with the holder of the tax title the validity of that title at the risk of the lessor?*

In the case at bar, when the lessor discovered the injury that had been done, she made a compromise with the holder of the tax title through which the purchaser of the tax title (the Kanns) were to release to her the tax title. They were also to take a lease upon the premises at an advance of $1,200 per year in addition

to the other obligations assumed by the original lessee. The Court of Appeals has said that in such a case a court of equity can enjoin the lessor from making such a compromise, can further enjoin him from recovering possession at law of the demised premises from the defaulting lessee, and can thus deprive him of the benefit of the contract of compromise, and that it can further, at the risk of the lessor, inquire into the validity of the tax deed and adjudicate thereupon. It has not in either of its opinions cited a single authority authorizing such a proceeding, and it is believed that none can be cited. The result of the opinions of the Court of Appeals is that a defaulting tenant, who has done all the mischief, can defy the landlord, from whom he received possession, and thus can prevent the landlord from regaining possession and with it saving himself from the ruin brought upon him by the tenant on the ground that the landlord has lost title and right of possession through the tenant's own act. With great respect for the Court of Appeals, it is urged that this can not be the law. The authority of Bacon *vs.* Park (supra) is very pertinent in this connection.

9. Question nine is considered in the main brief at pages 91 to 96, and is mainly one of fact, which has been already hereinbefore adverted to.

10. *Question ten involves the matter of alleged fraud, accident or mistake on the part of the complainant as a ground of equitable relief.*

Its discussion occupies pages 96 to 186 of the main brief. This subject can only be reviewed in the limited time allowed for oral argument in the most hurried way. Reference will be made to the leading authorities upon the subject of accident and mistake. The leading English case upon the subject is that of Duke of Beaufort *vs.* Neeld et al., 12 Cl. & F., 248. In two subsequent cases

this leading case has been considered and affirmed by the court of appeals and the supreme court of judicature. One of these is the case of Barrows *vs.* Isaacs, 1 Q. B. D. (1891), 417. The second is that of Eastern Telegraph Co. *vs.* Dent, 1 Q. B. D. (1899), 835, decided in the year 1899. Attention is especially directed to the utterances in the last of these cases quoted at page 127 of the main brief. American authorities in point are those of Grimes *vs.* Sanders et al., 93 U. S., 55; Kinney *vs.* The Con. Va. Mining Co., 4 Sawyer, 382; Hunt *vs.* Hardwicke & Co., 68 Ga., 100; The Township of Churchill *vs.* The Township of Cummings, 51 Mich., 446; and Persinger *vs.* Chapman, 93 Va., 349, 352.

The main brief considers in detail at pages 131 to 141 certain American cases in which relief was granted on the ground of accident or mistake and contends that none of these cases justify the decree of the Court of Appeals in the case at bar. Reference must be made to the main brief for this discussion, as time will not permit it to be had in oral argument, and it can not be effectively condensed.

Even, however, should the court be of opinion that the repeated defaults made from December, 1897, to July, 1900, could be excused, yet when the action of Harry King from July, 1901, to October, 1901, is considered, it is submitted that there is no possible ground upon which resort can be had to relief by reason of accident or mistake.

Upon the question of fraud there is a discussion in the brief beginning at page 148 and continued to page 186. It is sufficient to say upon this head that in the pleadings, and in the evidence the charge of fraud and collusion between Webb and Cohen and the Kanns, made in the correspondence of counsel for the complainant, and reiterated in the bill, is not only not proved, but not attempted to be proved. It is denied absolutely by the only per-

sons who could have any knowledge thereof, and there is not one word of proof to overcome this denial. This is a wanton charge made in the exigencies of the complainant's case and should not have been made. Under the leading cases of Price *vs.* Berrington, 7 English Law and Equity, 254; Eyre et al. *vs.* Potter, et al., 15 How., 42; and Warner *vs.* Godfrey, 186 U. S., 365, these groundless charges should not receive favorable consideration and upon failure to prove them, the appeal should be dismissed without reference to secondary grounds of relief. It will be noted in connection with the charges of fraud and duress, which are also discussed at the indicated pages of the main brief, that the position of the complaintant is not consistent. It appears that while the Kanns, through their attorney Cohen, were urging upon the lessor a line of action favorable to their interests, Harry King and his attorney were equally busy in urging the opposite line of action. There was no more duress on the one side than on the other, nor was there duress on either. The lessor was threatened with inevitable litigation on the one side or the other. On the advice of her counsel she choose that line of action which she thought most advantageous to her.

So with respect to the charge of fraud and collusion, in one breath it is urged that Cohen did everything in hostility to Webb—he gave Webb but short notice of the visit to Rochester and that at a time, it is said, when Webb could not get money to follow him or to buy the outstanding tax title over his head. He went at an hour when the court could not enjoin him from going or when a writ of *ne exeat* could not have been used against him. All these matters are suggested in one breath. In another it is argued that Webb's expostulations with Cohen with respect to going to Rochester and buying the

tax title, and his conversations with him were simply by-play and childish, and that the whole thing was merely a dumb show, and that they were really in collusion. Now either of these arguments may be made, although absolutely without support from the testimony, but both of them can not be made consistently.

11. This question relates to *laches* and has already been sufficiently adverted to.

12. Assuming that counsel for the appellants fail entirely to convince the court that the complainant is not entitled to relief, then she should have relief only on the condition of paying all costs and reasonable counsel fees to the landlord, incurred in resisting such relief. This position seems reasonable and in addition is supported by the authority of Eichenlaub *vs.* Neil, (supra). Counsel for the appellant desire, however, to reiterate that to give relief in the case at bar is to do violence to the law.

As Chief Baron Thompson said in Bracebridge *vs.* Buckley (supra):

> *"It really comes to a question whether, in all cases of reentry on breach of covenant, a court of equity will do away with the covenant."*

As Lord Campbell said in Duke of Beaufort *vs.* Neeld (supra):

> *"It would be a disgrace to the law if there could have been such a decision."*

As Lord Justice Smith said in Eastern Telegraph Co. *vs.* Dent (supra):

> *"I could not bring myself to say that a judge could run his pen through that part of the contract, which is that consent should be asked for and render it of no effect."*

As Lord Justice Ray said in Barrows *vs.* Isaacs (supra):

> "*It is impossible not to see that such relief would be an incentive to negligence. If we were to grant it, hereafter lessees might avoid looking at their leases, lest they should be reminded by them of obligations which it would be more convenient to ignore.*"

It is respectfully submitted that the decree of the Court of Appeals of the District of Columbia should be reversed on every assignment of error.

R. ROSS PERRY,
R. ROSS PERRY, JR.,
E. S. THEALL,
Counsel for Appellant Webb.

FILED
MAR 6 1906
JAMES H. McKENNEY,
Clerk.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. [redacted]16

LOUIS KANN, SIGMUND KANN, AND MYER COHEN,
APPELLANTS,

vs.

CAROLINE KING, APPELLEE.

No. [redacted]17

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE
A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING, APPELLEE.

BRIEF FOR APPELLEE.

J. J. DARLINGTON,
LEON TOBRINER,
Solicitors.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 20579

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 202.

LOUIS KANN, SIGMUND KANN, AND MYER COHEN,
APPELLANTS,

vs.

CAROLINE KING, APPELLEE.

No. 203.

HENRY RANDALL WEBB, EXECUTOR OF MARIANNE A. B. KENNEDY, APPELLANT,

vs.

CAROLINE KING, APPELLEE.

BRIEF FOR APPELLEE.

STATEMENT.

The above are two appeals, by the respective appellants, from a decree of the Court of Appeals of the District of Columbia, affirming a decree of the supreme court of the District of Columbia, printed at page 482 of the Record, in an

equity suit by appellee against the appellants, seeking relief against the forfeiture of a lease.

The material facts are as follows:

On July 8, 1890, the late Marianne A. B. Kennedy, testatrix of the appellant Webb, leased to Henry King, Jr., premises No. 715 Market space for a term expiring, with its extensions, on the 1st day of October, 1908, at a rental of $2,400 per annum, the lessee covenanting (1) to pay the rent promptly; (2) to use the "store part" only as a fancy and dry goods store, and the remaining parts of the building as a dwelling-house or for offices; (3) not to sublet or assign without lessor's written consent; (4) to keep the demised premises in good repair; (5) to pay or to cause to be paid in each and every year of the term all taxes; (6) to surrender peaceably at the end of the term in good condition and repair; and (7) to pay the rental in equal monthly instalments, with an option to the lessor to determine the lease upon default in the performance of any of the covenants enumerated (Record, p. 13).

On August 15, 1897, Henry King, Jr., died, and the lease was assigned to the appellee, Caroline King, Mrs. Kennedy consenting, in writing, to the transfer and assignment (Record, p. 17).

The bill alleges that through an oversight and inadvertence arising from complainant's affliction and mental distress in consequence of the then recent death of Henry King, Jr., who was her husband, and of the perplexity and distraction caused by the unfortunate condition in which his business affairs were found to be entangled, the instalment of taxes due upon the property for the second half of the fiscal year ending June 30, 1898, was overlooked and left unpaid; that at an attempted tax sale thereof on account of that default, and without her knowledge of it, one C. H. Wiltsie, of Rochester, New York, a dealer in tax titles, bid in the property for $143.83, she continuing to pay the rent and all subsequent taxes; that two years later, when the tax

sale, if valid, had become irredeemable, Wiltsie demanded from her repayment of the price paid by him, with 15 per cent. per annum thereon, and an additional $100 to release his claims; that considering this demand excessive, and being advised that the sale was wholly void, she entered into a negotiation with him for a compromise at a less exorbitant figure; that the appellants Sigmund Kann and Louis Kann, who are her rival and competing merchants, their stores surrounding hers, had some months prior endeavored to deprive her of her said place of business premises by offering Mrs. Kennedy an increase of $100 per month over the rent fixed by her lease, and had failed in this effort only because her lease protected her in the possession of the premises until 1908; that in September, 1901, one Charles H. Knight, a practitioner in tax-title matters, being aware of the fact of the attempted tax sale and that it was invalid because the assessment, advertisement, and sale were in the name of Maria T. Gillis, whereas Mrs. Kennedy was and for many years had been the owner of the property, approached the Kanns in respect to the matter, was informed by them that Mr. Webb was the attorney of the owner, and thereupon called upon Mr. Webb, offering to secure annulment of the tax sale because of its said invalidity; that Mr. Webb then informed Mrs. Kennedy of the tax sale, advising her that she might either treat it as a ground of forfeiture or not, but that, in his opinion, it would be to her interest to enforce forfeiture; that, being informed by her that she did not see how she could do this unless first certain of a new tenant (Record, p. 95), he inquired of Myer Cohen, the attorney of the Kanns, whether they were still willing to pay $300 per month for the property, and, receiving an affirmative answer, a lease from Mrs. Kennedy to the Kanns was forthwith agreed and determined upon between them, "so far as an unwritten agreement could settle it" (Record, p. 43).

After learning from Mr. Webb that the tax sale had become irredeemable, and that the tax title was held by Mr.

Wiltsie, Mr. Cohen conceived the idea of going to Rochester, where Wiltsie lived, and of purchasing it for the Kanns; and, "desiring to avoid the appearance of any concealment of his purpose from the said Webb," he informed Mr. Webb, at six o'clock in the evening, of his purpose, and that he and Cohen "must deal at arm's-length;" to which Webb replied, "I do not know about that," and Cohen answered, "Well, I do" (Record, p. 45). This interview, Mr. Cohen testifies, took place at six o'clock, p. m., of the day on which he proposed going to Rochester, and at an hour when the banks and the courts were closed, so that, as he further states, Mr. Webb had no facilities for making pecuniary arrangements for forestalling or competing with Mr. Cohen in getting in the tax title, or access to the courts to enjoin him from doing so (Record, pp. 400-1). The extensions of the term of the lease, to which it owes its present existence, were, all of them, prepared by members of Mr. Cohen's law firm (Record, pp. 390-1, 423-4), while Mr. Cohen's knowledge of the fact which made the tax title valuable, namely, the fact that the time within which to redeem from the tax title had expired, was derived by him from Mr. Webb in the course of the treaty or negotiation between them which resulted in the agreement for the lease from Mrs. Kennedy to the Kanns (Record, pp. 382-4), and after he had agreed that the Kanns would take the lease. His object in acquiring the tax title was "to hold it as a club" which he "could use as necessary against either Mrs. Kennedy or Mrs. King" (Record, pp. 382-3); the occasion or cause of this precaution being that, in a former instance, Mrs. Kennedy, after making some concession to the Kanns in regard to the property, had been induced by her tenants, the Kings, to withdraw it, and the desire of Mr. Cohen to prevent any similar change of attitude in the matter of the lease (Record, p. 423).

Arriving in Rochester, it is testified by Mr. Wiltsie that Mr. Cohen was told of the fixed rule of Wiltsie's office not to dispose of tax certificates to parties who were not in-

terested in the property or the title, and, upon being asked the question, stated that he represented parties so interested (Record, pp. 254, 259-60); and, although this is denied by Mr. Cohen, Mr. Wiltsie is corroborated by his cashier, Miss Watson, who testifies, at page 267, that Mr. Cohen declared he represented interested parties, and asked whether he could "redeem" the certificate. According to his own testimony, upon being informed by Mr. Wiltsie that the latter had been asking $300 for the certificate, Mr. Cohen immediately offered him $500; whereupon, having first learned by telephoning to the Central National Bank of Washington, where it had been deposited by Wiltsie pending the negotiation for its extinguishment, that the Kings had not redeemed it, the tax certificate was recalled, the bargain closed, Mr. Cohen returned to Washington on October 3, and on the same day surrendered the tax certificate, obtained a tax deed from the Commissioners, and recorded the same, explaining, at page 404, that he had obtained and recorded the tax deed in one day instead of waiting the usual length of time, which is a week or ten days, through fear that he "might be stopped by an injunction or something."

The day following the recording of the tax deed, Mr. Cohen, being waited upon by Mr. Tobriner as the attorney of Mrs. King and interrogated as to his purpose in obtaining the tax title, answered, "You know that I have been for some time trying to get a lease of these premises for the Kanns, and I bought this tax deed with the expectation of forcing the Kings out of the property, and of being able to put the Kanns into possession of it" (Record, p. 238). Being informed by Mr. Tobriner of the impossibility of getting Mrs. King's title through any arrangement with her, there being an equity suit pending by creditors of her husband attacking the validity of the assignment of the lease to her, he proposed that this difficulty be gotten over through the expedient of a landlord and tenant proceeding against Mrs. King, a pre-arranged judgment by default against her, and

the leaving of a sum of money on a table or elsewhere, where the Kings might find it, as a consideration for acquiescing in such judgment by default (Record, pp. 238, 249-50, 274, 416-17, 480-1).

In Mr. Webb's answer, and in certain correspondence with the reprsentatives of Mrs. King following his client's refusal, upon his advice, to accept the October rent and her election to declare the lease forfeited, such action is stated to have been taken because of Mrs. King's default in the payment of the tax, culminating in the hostile tax deed, which, it was claimed, rendered it imperative that Mrs. Kennedy should insist upon the termination of the lease and resumption by her of possession of the property (Record, p. 22), and made it improper that she should allow the use of her name in legal proceedings to vacate the tax deed "in favor of a person who has proved so faithless to the important obligations contained in the lease" (Record, p. 23). These grounds for the position then taken are, however, admitted by Mr. Webb to have been merely Pickwickian or "legal," the real reasons, as candidly admitted by him, being the desire of Mrs. Kennedy, upon his advice, to get rid of the long lease which Mrs. King held, and to secure the higher rental which the Kanns were offering to pay (Record, pp. 309, 316-17, 351, 354-5). There was, in reality, no hostility to the Kings at all, but merely a question of a higher rent and a shorter term (Record, p. 317); and Mr. Webb, with Mrs. Kennedy's concurrence, was in the act of preparing a proposition for continuing Mrs. King in possession at an increased rental on the 9th day of October, when he received a call from Mr. Cohen and an attorney for the Kanns, the result of which call was to cause him to throw into his waste basket the compromise proposition upon which he was engaged, and to lead his client and himself thereafter to act in concert with the Kanns in insisting upon the forfeiture with the view of giving them a lease and possession of the premises (Record, pp. 349, 352, 353-4, 325, 326).

This interview of October 9 between Mr. Cohen, the counsel of the Kanns, and Mr. Webb was occasioned as follows: On the preceding day, October 8, Mr. Cohen had been informed by Mr. Webb that a Mr. Cahill, representing Mrs. King, was endeavoring to negotiate a compromise of the forfeiture, and, upon Mr. Cohen's claiming that an agreement had been made between them for a lease to the Kanns, Mr. Webb stated that he did not so consider the matter, and that his own duty was to his client under the circumstances (Record, p. 370). Thereupon Mr. Cohen, being thus made aware that proposals for a new lease with the Kings were under consideration, and that Mrs. Kennedy was not then intending to lease to the Kanns, but to allow the Kings to continue their occupancy (Record, p. 414), concluded that the time had come to use the "club" which he had obtained through his purchase of the tax title, and proceeded to employ counsel for the purpose (Record, pp. 408-9); and, calling with his counsel on Mr. Webb on the following day, October 9, they informed him that the tax certificate was owned by the Kanns, and that they would not surrender it (Record, p. 291); that if Mr. Webb would get rid of the Kings and lease the property to the Kanns, they would take a lease at $300 per month and surrender the tax certificate, but that if he should refuse to do this they would hold the tax title in hostility to Mrs. Kennedy, and possibly bring ejectment proceedings against her (Record, pp. 292, 318); that if Mr. Webb did not eject the Kings and make the Kanns a lease, they would enforce their title—that they would hold it adversely, and Mrs. Kenedy must take the consequences (Record, p. 319).

These representations Mr. Webb regarded as a "threat," and "acted accordingly" (Record, p. 318). He had entered into the negotiation with Mr. Cahill for a compromise with the Kings in pursuance of Mrs. Kennedy's desires (Record, p. 349); but, as the result of this interview of October 9, "the situation then completely changed," and he informed

Mr. Cahill that it was "impossible to negotiate with him"—because this could only be done "by fighting for the existence of the property, and I did not care to run that risk for this lease, which we were anxious to get rid of" (Record, p. 352). "The entire change of situation" referred to was, simply, the threat made at the interview of October 9 (Record, p. 354). At that interview, and as the result of it, Mr. Webb threw the Cahill compromise into his waste basket (Record, p. 325), informed Mrs. Kennedy fully of the threat, told her that the Kanns held the tax title, which they offered to surrender if the property were turned over to them as tenants, but if this were not done that they would hold it adversely, and she must take the consequences, and thereupon advised her "to accept the lesser of the two evils, to forfeit the lease, and lease the property to the Kanns," and informed her that, if she would not do this, they would endeavor to assert the tax title, and that they might take her property from her (Record, p. 319), and he thereafter informed the counsel for the Kanns that Mrs. Kennedy had decided to accept their proposal (Record, p. 326).

The version of this interview of October 9 given by Mr. Cohen, while presenting it somewhat more euphuistically, coincides with that of Mr. Webb in every practical or essential respect (Record, pp. 414-15), as does the statement of it in the brief filed on his behalf at pages 13-14, 42-3. The counsel for the Kanns were informed by Mrs. Kennedy's physician, at an interview between them arranged by Mr. Webb, that she was very old, in frail health, and liable to be seriously affected in her health if litigation should ensue; with which knowledge he and Mr. Webb were informed that litigation was inevitable (Record, p. 411). Mrs. Kennedy died on the evening of the day on which the bill in the case was filed.

The circumstance that this interview between Dr. Fry and the counsel of the Kanns, in the effort of the former to spare his patient the danger which he apprehended to her

life and health, was not sought by them, but was arranged by Mr. Webb, is declared at pages 39-40, to be "an important fact," while, at page 38, it is declared that duress cannot be predicated upon the interview, because it was never communicated to Mrs. Kennedy. Inasmuch, however, as the arrangement for the interview followed, and was obviously occasioned by their interview with Mr. Webb of October 9, and the statement then made of their intention and purposes, the importance of the former of these claims is not clear, while the latter of them is in direct conflict with the undisputed testimony in the case at page 319 of the Record.

As has been stated, the lease contained a covenant upon the part of the lessee to pay, in each and every year of the term, all taxes assessed against the property from its date in 1890, and the covenant was performed until after the death of Henry King, Jr., the original lessee. The lessee, however, was not intrusted by the lessor with the duty of paying the taxes, the covenant of the lease in that regard being performed in the following manner: The lessor, at each tax-paying date, ascertained and communicated to the lessee the amount of the tax, demanded his check for its amount, and then herself, through her own agents, paid the tax, furnishing a striking illustration in this very case of what was said by the Court of Appeals when the case was first before it, in 21 D. C. App., at page 152, viz:

"A lessor does not escape the duty of vigilance, which is no very difficult duty, to see that the taxes on his property are paid, when by agreement he has shifted the burden of payment from himself to the lessee as between themselves. It is not more difficult for him to make inquiry in this regard for the purpose of preventing a forfeiture, than it is to make similar inquiry for the purpose of enforcing a forfeiture."

In the answer of Mr. Webb, at page 78, it is averred that from 1890 to 1897, when he died, Henry King, Jr., did not pay any of the taxes as he had covenanted to do, which

charge is echoed in the answers of Cohen and of the Kanns (Record, pp. 37, 63). The proof to the contrary, however, consisting of the letters of Mrs. Kennedy to Henry King, Jr., stating from time to time the amount of the taxes due and calling for his checks to cover them, and the checks of Mr. King in response to these demands, endorsed by Mrs. Kennedy in her own handwriting, and afterwards, in some instances, by her agents Swormsted and Bradley, or R. E. Bradley, through whom the payments were made (Record, pp. 166-8, 197, 276-9), is conclusive and is admitted to be so by Mr. Webb himself in his testimony (Record, pp. 303-4).

With respect to the non-payment of the taxes on the two small parcels of land in the rear of the premises (see plat, Record, p. 54), which is insisted upon by the appellants as an additional breach of the covenant, the allegations of the 11th paragraph of the bill that these parcels, one of which contains 117 square feet and the other 16 square feet, were never considered or treated by the parties to the lease as covered by the covenant, are substantiated by the letters of Mrs. Kennedy above referred to. In these letters she states specifically the amount of the taxes for which the lessee was liable, and she received it from him, he naturally supposing that her demands fully covered the taxes payable by him to her, as they purported to do. The appellee has paid all the taxes upon these rear parcels since the matter was called to her attention (Record, p. 482).

With reference to the default in the payment of the taxes under which the attempted tax sale was made, the testimony shows that, in December, 1897, Mrs. Kennedy notified Joseph King, son of the appellee, that she had neglected to pay the instalment of taxes which fell due in November of that year, and asked if the Kings would not see that it was paid (Record, pp. 154-6), which was promptly done (Record, p. 169). She made no similar subsequent request, and gave no notice that she intended to change what had been, from

the date of the lease, her invariable course of dealing with the lessees, namely, that of notifying them of the amount of the taxes, requesting a check for the amount, and, herself, paying the taxes. She discontinued that practice without any information or suggestion to Mrs. King that she was no longer to expect such notice, but was herself to attend to the matter of ascertaining their amount and seeing to their payment. As a result, and of the mental distress, anxiety, and worry of the appellee and her family in consequence of her husband's death, and of the condition in which his financial affairs were found to be at his decease (Record, p. 170), the matter was overlooked until the year 1900, when appellee's son Harry King, in his capacity as one of the receivers for his father's estate, and then engaged in paying taxes on the same, requested his bookkeeper, Mr. James G. Rodgers, to inquire as to the taxes on 715 Market space (Record, p. 171), and paid the taxes which Rodgers reported to be due (Record, p. 171). This was in July, 1900 (Record, p. 126), and the tax so paid was for the fiscal year ending June 30, 1900 (Record, p. 280). Mr. Rodgers testifies that he asked at the tax office for a bill of all the taxes that were due, and that he was informed by the tax clerk that the bill in question was for everything that was then due (Record, p. 126). He testifies that, on May 21, of the following year, 1901, he was sent by Harrry King for the tax bill for that year, received it, obtained from Mr. King a check for its payment, and, when he returned to the tax office to pay it, was informed that there were some back taxes; that he remonstrated with the tax officials, reminding them that they had told him the year before that the bill then given him covered all the then arrears, and that he then said to them, "Give me a bill for whatever is due on the property and I will get another check;" that they then gave him a bill for the last half of 1898 and for the whole of 1899; that he went back to Mr. King, got a second check for the amount of these latter bills, and paid both of them (Record, pp. 127-8, 281-4).

At the hearing below, both in the briefs and the argument, it was sought to be assumed that Mrs. Kennedy's request, through Joseph King, was that the Kings would thereafter attend to the payment of all future taxes, without request or notice from her to remit to her for the purpose, as had theretofore been her custom. The testimony upon the subject, at page 155 of the Record, refutes the assumption. The request referred only to the November, 1897, instalment, then already due, and was a request to pay that instalment, which had been overlooked.

Mr. Rodgers' testimony was given several years after the transactions to which it relates, and, at first, without having refreshed his memory by any examination of the books kept by him, in which books the transactions in question were entered. At a subsequent session, having examined the books in the meantime, he admitted some inaccuracies as to particulars (Record, p. 140 *et seq.*), but in none, it is submitted, which affords just ground for criticism of his integrity, or of the substantial accuracy of his testimony in all its material parts. Having testified, further, on cross-examination, that, as he remembered it, the tax bill for the year ending June 30, 1900, had been made out before he called for it, and was taken by the tax clerk out of a box containing bills already prepared (Record, p. 150), an attempt was made to discredit him, although the matter was wholly without materiality, by calling as a witness Miss Lidie Addison, the tax clerk in whose handwriting the bill was, who testified that she had not informed Mr. Rodgers that there were no back taxes, and that the custom of making out bills in advance and keeping them in a box was not inaugurated until the following year, 1901 (Record, pp. 452-3). On cross-examination, however, she admits the fact that the bill, though made out by her, might have been delivered to Mr. Rodgers by some other of the clerks in the tax office at the time, and that the bill has upon it the letter "A," in red pencil, which method of marking bills,

according to her recollection, also, was not inaugurated until the year 1901 (Record, pp. 454-5). No one of the several other clerks employed at the time in presenting tax bills to applicants was called, nor any effort made either to corroborate or to reconcile Miss Addison's testimony in regard to the date at which the keeping in a box of tax bills, made out in advance, or of marking them with a red letter "A," originated.

The entire matter of the corrections made by Mr. Rodgers in his testimony at the second session at which he testified, and of the attempted contradiction of him by Miss Addison, is clearly irrelevant to any material question in the case, and is only referred to here in justice to the witness, in view of the attacks sought at the hearing below to be made upon him. Both he and Harry King testify that Rodgers' instructions were to ask for all the taxes that were due upon the property (Record, pp. 132, 171), and he testifies that he did so. Even if he did not, of which there is no evidence, the negligence would be that of the agent and not of the principal, which, under the authorities, exonerates the latter from the guilt of personal or willful negligence, such as will preclude relief against forfeiture (Noyes *vs.* Anderson, 124 N. Y., 175).

The statement in the Brief for Webb, at page 141, that Harry King was a systematic defaulter in the payment of taxes on his father's estate has no other foundation than the fact that between February and July, 1900, he and Judge Barnard, as receivers of the estate of his father, had settled a number of tax claims against property of the estate. His testimony, quoted at pages 142-3 of the Brief, needs but to be read in connection with that at page 170 of the Record, to which the former plainly refers, to show how equally unfounded is the claim that the failure to pay the tax was from sheer neglect or because it was pecuniarily inconvenient. There is not a syllable of testimony to show that the neglect was willful, or that the payment was pecuniarily inconvenient.

Equally untenable is the contention, at pages 54-6 of the Brief in No. 202, that the finding by the Court of Appeals in its opinion that the appellee was in the midst of financial trouble and distress caused by the recent death of her husband, and that her default was excusable under the circumstances is unfounded, because the husband's death occurred ten months before the default, and the record shows that she successfully conducted the business, and was not "strained at all" in so far as that business was concerned. The allegation of the bill in this record (Record, p. 3) does not refer to the mercantile business conducted on the premises in controversy, but to the "perplexity and distraction caused by the unfortunate condition in which his [*i. e.*, her husband's] business was found to be after his death;" and that this perplexity and distraction continued after the default, is shown above.

This question, like that *infra*, as to whether the request by Mrs. Kennedy in December, 1897, was that all future taxes, or only the then overdue instalment, should be paid by Mrs. King, in departure from what had theretofore been the lessor's practice under the lease, was a question of fact, as to which this court cannot be called upon to review or reverse the findings of the lower courts, unless there is a clear showing of error.

Dravo *vs.* Jabel, 132 U. S., 487.
Stuart *vs.* Hayden, 169 U. S., 1.
Shappirio *vs.* Goldberg, 192 U. S., 232, 240.

The allegation in the answers of the defendant Cohen (Record, p. 39) and of the defendants Kann (Record, p. 65), apparently adopted in the answer of the defendant Webb (Record, p. 68), that the lessee violated the covenant of the lease to use the "store part" only as a fancy and dry goods store and the remaining parts of the building as a dwelling-house or for offices, is disproved by the testimony of Joseph King, Harry King, and Philip King (Record, pp. 153, 178, 203), and is not attempted to be supported by

any evidence. The charge of the answers that a structural change was made, depriving the premises of a front entrance, is met by proof that this change, which was a material improvement to the property, was made with Mrs. Kennedy's knowledge and entire concurrence, and that when completed she congratulated the Kings upon it (Record, pp. 154, 178, 203), the testimony upon this point also being uncontradicted. There is, moreover, no provision in the lease against structural changes, or for forfeiture because of them.

On November 9, 1901, a landlord and tenant proceeding was instituted against the appellee to eject her from the premises, on the ground that she had forfeited her term by the omission to pay the taxes, whereupon she filed her bill in this cause to restrain that proceeding, and to be relieved against the forfeiture upon terms tendered in the bill, of paying the taxes due, with any legal accumulation of interest and penalties and all costs and expenditures which should be adjudged equitable, the bill alleging that the tax-title was void for the irregularities which will be presently pointed out, and that it, therefore, presented no obstacle to the relief sought. The original defendants were the lessor, Mrs. Kennedy; Myer Cohen, the tax-deed grantee, and Sigmund Kann and Louis Kann, the actual purchasers and beneficial holders of the tax title. Upon the death of Mrs. Kennedy, her executor, Henry Randall Webb, and Maria G. Dewey, her heir-at-law, the will containing no residuary devise or bequest, were made parties.

The decree of the supreme court of the District of Columbia of June 30, 1904, declared the tax deed null and void, and granted relief against the forfeiture as prayed upon payment by the appellee of the rent and taxes, accrued penalties and interest, one-half of the cost to be paid by her and the other half by the defendants Cohen, Kann and Kann. This was affirmed by the Court of Appeals, from whose decree the first of the above appeals is taken by the appellants Kann, Kann, and Cohen, and the second of them by Henry Randall

Webb, executor. Mrs. Dewey has not concurred in or sanctioned the appeal, but has expressly declined to do so (Record, p. 484).

POINTS AND AUTHORITIES.

As to the breaches of the covenants in the lease other than that for the payment of taxes, which are set up in the answers, the violations alleged were that the "store part" of the premises had been used for other purposes than those of a fancy and dry goods store, and the remaining parts of the building for other purposes than those of a dwelling-house or for offices, to which was added a charge which, if true, would not have been a breach of any of the covenants, namely, that the lessee had wrongfully closed up one of the front entrances to the premises. As pointed out *supra*, each of these charges is completely refuted by the testimony of the witnesses produced on behalf of the appellee, while no testimony was offered to support them.

The other assignments of error in the decree below may be summarized as follows:

I. That the court erred in holding that the tax deed was void.

II. That the court erred in holding the circumstances under which and the purposes for which the tax title was procured to be such as to entitle the appellee to relief.

III. That the court erred in not holding that the bill was multifarious.

IV. That the court erred in holding that the delay of the appellee in redeeming the tax certificate from Wiltsie was not, under the circumstances of the case, laches such as to preclude her from relief.

V. That the court erred in refusing to hold that omission to pay the taxes was a ground of forfeiture against which courts of equity cannot relieve.

VI. That the court erred in not dismissing the bill because of fraud charged against appellant Webb in No. 203 and not proved.

I.

IS THE TAX TITLE VOID?

The tax assessment, under which the attempted sale was made, was governed by the provisions of the act of Congress of August 14, 1894, 28 U. S. Stats. at Large, page 282, the first section of which is as follows:

"All real property in the District of Columbia, except as hereinafter provided, shall be assessed in the name of the owner, or trustee or trustees of the owner thereof. All undivided real property of a deceased person may be assessed in the name of such deceased person until the same is divided, according to law, or has otherwise passed into the possession of some other person or persons; and all real property, the ownership of which is unknown, shall be assessed 'owner unknown.' "

The sale, itself, was governed by the act of February 28, 1898, 30 Stats. at Large, page 250, which, after enacting in its first section for publishing a notice of sale, "which shall contain the name of each and every person in which each piece of property is assessed," *i. e.*, the name of the owner, under the foregoing requirement, etc., provides in the fifth section as follows:

"That the collector of taxes shall, within five days after the last day of sale hereinbefore provided for as aforesaid, file with the recorder of deeds a written report in which he shall give a statement," as follows:

1. Of the property sold, other than that sold to the District of Columbia.

2. To whom assessed.

3. The taxes due.

4. To whom sold.

5. The amount paid.

6. The day of sale.

7. The cost thereof.

8. The surplus, if any.

The only published notice of sale is that shown at page 124 of the Record. If, in respect to sublot A, the property concerned in the tax title, the notice can be claimed to contain the name of the person in which it was assessed, which is not conceded, the name so contained was that of Maria T. Gillis, who had died in January, 1871, intestate, leaving as her only heir-at-law Marianne A. B. Kennedy (Record, p. 126). It was also shown that the assessment was made in the name of Mrs. Gillis (Record, p. 160).

With respect to the report required by law to be filed by the collector of taxes, the testimony shows that on May 9, 1899, that officer delivered to the recorder of deeds what, made up in loose or unbound sheets, purported to be his report (Record, pp. 229, 471). Instead of being allowed to remain in that office, however, it was returned to the collector on the 5th day of April, 1900, since which time there has been no report of this tax sale filed in the office of the recorder of deeds (Record, pp. 229-30).

There is, it is true, what is claimed to be a copy of the said report recorded among the land records of the District of Columbia; but, in the first place, there is no provision of law either authorizing the report to be recorded or permitting it to be withdrawn after such record, and, in the second place, the so-called record copy, transcribed into several disconnected books, with no certification of any character as to at

least two of these books, in one of which the only reference to the property in controversy appears, is so fragmentary, vague, and uncertain as to be without any legal sufficiency or effect, even if there were a law providing for recording the report at all.

The so-called record copy begins, apparently, in Liber 2391, and fills up the remainder of that liber. Without anything in the nature of a reference to what precedes or follows, or to direct attention, and with twenty-eight intervening libers filled with unconnected matter, another portion of the so-called report entirely fills Liber 2419. Then, with seventeen libers of the land records filled with other matter, what is claimed to be the remainder of the report is contained in Liber 2436, with the same omission of identification, or reference of any kind to direct attention to the first volume. Excepting a top-page heading, "Real-estate tax sale, District of Columbia, April 12 to 19, 1899," Libers 2419 and 2436 contain no certification or explanation, the import of the contents of these volumes, the first of which, as above stated, contains the only reference to lot A, in square 432, being left to inference and conjecture.

As will be seen by inspection of the so-called report, at page 234 of the Record, it omits to state, except by implication, to whom the property is assessed. It omits to state the amount of taxes due; it omits to state, except by possible inference or implication, the name of the purchaser; it omits to state the amount paid, the day on which the property was sold, or the cost of the sale (Record, p. 234)—all of these omissions being contrary to the express requirements of the statute under which the attempted sale was made.

The tax sale is accordingly invalid, for the following reasons:

1. Because the property was not assessed or advertised in the name of the owner.

2. Because the collector of taxes did not file his report in the office of the recorder of deeds as required by law.

3. Because of the omission of the report to comply with the requirement of law in the half dozen particulars above enumerated.

1.

THE ERRONEOUS ASSESSMENT AND ADVERTISEMENT.

In the court below, it was urged on behalf of appellants that the requirement of the act of August 14, 1894, that all real property in the District of Columbia should be assessed in the name of the owner, etc., applied only to assessments theretofore made, and was without application to the 1896 assessment, under which the tax sale was attempted to be made; and, assuming that the same position may be taken here, a brief examination of that question becomes necessary.

Under an act approved August 5, 1892, an assessment had been made by a board of three assessors, which proved unsatisfactory to the public. In appointing a permanent board of assessors, the act of August 14, 1894, provided that this new board should revise and equalize the assessment made under this act of 1892; and the claim by appellants in the court below was, that it was only in respect to assessments made under that act of 1892 that the assessment was required to be in the name of the owner. This contention was based upon the proposition that, since the first section of the act of August 14, 1894, enacted "that all real property in the District of Columbia, *except as hereinafter provided*, shall be assessed in the name of the owner, or trustee or trustees of the owner thereof;" and since the third fourth, and fifth sections of the act provided that real property should be assessed and valued in the year 1896, and every third year thereafter, that the Commissioners should furnish each member of the board of permanent or assistant assessors "with the necessary maps and field books, which shall contain an accurate list of each tract, together

with a pertinent description of the real property situate in the District of Columbia, and, *as far as may be known,* the owner thereof," and that the Commissioners should make "such rules and regulations touching the manner in which the real property shall be described in the assessments returned by the assessors as they may deem best," the provisions of these three sections should be construed as the exceptions "hereinafter provided" referred to in section one; and that, under these subsequent sections of the act, the only requirements were that the Commissioners should furnish the assessors with maps and field books containing a description of all the property, and, "as far as may be known, the owner thereof," and that they should make such rules and regulations touching the "manner in which the real property should be described in the assessments returned by the assessors as they may deem best."

Divesting the matter of ingenious paraphrase and phraseology, the statute, if the foregoing is the true construction, stands as follows:

"That all real property in the District of Columbia shall be assessed in the name of the owner, or trustee or trustees of the owner thereof, except that the Commissioners shall furnish the assessors with necessary maps and field books containing a proper description of all the property and, as far as may be known, the owner thereof, and except that the Commissioners may make such rules and regulations touching the manner in which the real property shall be described in the assessments returned by the assessors as they may deem best."

As to so much of the foregoing contention as is based upon the use of the words in the first section, "except as hereinafter provided," the natural purport and meaning of those words is clearly found in the following paragraph of the very section in which they are contained—the first section as a whole reading as follows:

"That all real property in the District of Columbia, except as hereinafter provided, shall be assessed in the name

of the owner, or trustee or trustees of the owner thereof. All undivided real property of a deceased person may be assessed in the name of such deceased person until the same is divided according to law, or has otherwise passed into the possession of some other person or persons; and all real property, the ownership of which is unknown, shall be assessed 'owner unknown.' "

In other words, the exceptions "hereinafter provided" are (1) the undivided property of a deceased person, which may be assessed in his name until the same is divided according to law or has otherwise passed into the possession of some other person or persons, and (2) all real property the ownership of which is unknown, which property shall be assessed "owner unknown." Nor can the provision of the fourth section, providing that the Commissioners should furnish each assessor with a map and field book of his respective subdistrict, containing an accurate list of each tract, a description of the real property situate therein, and, as far as may be known, the owner thereof, be held to cut down the meaning of the first section so that it should no longer require property to be assessed in the name of the owner except in so far as the Commissioners might happen to know who the owner was at the time they were thus equipping the assessors.

Neither does the provision of section 5, authorizing the Commissioners to make such rules and regulations as they might deem best touching the manner in which the real property shall be described in the assessment returns repeal section 1, which provides, not how the real property shall be described, but that it shall be assessed in the name of the owner.

As a mere matter of construing the phraseology employed, therefore, it is submitted that the construction contended for on behalf of the appellants is untenable.

In addition, however, statutes are to be construed, not solely or mainly by their phraseology, but with reference to the object which they were intended to secure. What was

the object of the provision that property should be assessed in the name of the owner? The answer to this question is plain and simple. The subject-matter of the act was not new. Similar provisions are to be found in the tax laws of nearly every State in the Union, and the courts have declared the object to be to give the owner, whose property is thus made liable to practical confiscation through the means of a tax sale, that kind of notice which will be the most likely to attract his attention. As this court said in City of Washington *vs.* Pratt, 8 Wheat., at page 686:

"The name of the real party in interest must have been, in the eye of the Congress, the most awakening circumstance of advertisement required to warn him of his danger."

No reason can be conceived why Congress should have intended that persons whose property might be endangered by tax sales assessed under the act of 1892 should have the benefit of advertisement in their own names as "the most awakening circumstance" to warn them of their danger, but that no owner should have the benefit of such warning whose property was to be sold under the subsequent asesssment provided for. Such a construction would be, not simply unreasonable, but inexplicable and absurd.

Still in addition, and reverting to the prior state of the law, which all the authorities agree is a proper starting point in the construction of any statute, we find that precisely the same provisions are contained in the act of March 3, 1883, which act is not complicated with or accompanied by any possible division line between assessments covering different periods. The first section of this act provides:

"All real property, except as hereinafter provided, shall be assessed in the name of the owner, trustee or guardian thereof; all undivided real property of a deceased person may be assessed in the name of such deceased person until the same is divided according to law, or has otherwise passed into the possession of some other person. All real property, the owner of which is unknown, shall be assessed 'owner unknown.'"

Section 4 of the act of 1883 contains the identical provision that the Commissioner shall furnish each assessor with a map and field book containing an accurate list of each tract, together with a pertinent description of the real property situate therein, and, as far as may be known, the owners thereof," etc.

Section 5 provides that assessments shall be, in Washington and Georgetown, according to the number of the squares and lots thereof, or parts of lots, or upon the number of square or superficial feet in the square or parts of lots, and, in the county, that agricultural lands shall be assessed by the acre, and suburban lots by the square foot as in the city of Washington; while section 5 of the act of 1894, in lieu of this specification of a different manner of describing urban and agricultural real estate, substitutes the provision that the Commissioners may make rules and regulations touching the manner in which the real property shall be described in the assessment returned by the assessors.

It is respectfully submitted that the attempt to confine section 1 of the act of 1894 to assessments begun by the board of assessors appointed under the act of 1892, referred to in the second section of the act, and to have all subsequent assessments governed only by the other sections of that act, exclusive of sections 1 and 2, is an impossible one, looked at from the standpoint of the phraseology of the act, or the object of the provision, or of the statutes *in pari materia,* or from any standpoint whatsoever. It presents no question, we submit, that the court can be expected seriously to entertain, and still less a question as to which any doubt can exist.

Taking either act together as a whole, as each must be taken, sections 1 and 4 provide that the property is to be assessed in the name of the owner, except in the case of the undivided real estate of a deceased person which has not passed into the possession of some other person, and except real property the ownership of which is unknown, and which

is to be assessed "owner unknown;" and that the Commissioners are to aid each assistant assessor by giving him a list of each tract within his subdistrict, with a pertinent description of the real property therein and, as far as may be known, the name of the real owner thereof. To assess it in the name of one who is not the owner, and who had not been for 27 years, was not a compliance with either of the alternatives allowed by the act.

If, as we submit, it is clear that the statute required the assessment to be in the name of the owner, and if, as is not controverted, the assessment in the present case was not in the name of the owner, it only remains to consider the effect of a different non-compliance with this requirement of the law.

(*a.*) If it be true, as all the authorities agree, that a strict, rigorous compliance with all the substantial requirements of the law is required to divest the owner of his property through a tax sale, there would seem to be but one answer to this question, if it were wholly new.

(*b.*) If, in addition, as this court and the authorities generally agree, the object of the requirement that the assessment be in the name of the owner is to afford him the warning of this the most "awakening circumstance," as a condition precedent to divesting him of his title, the same answer results from this additional point of view.

(*c.*) If, still in addition, this, the court of last resort in this jurisdiction, has expressly decided that non-compliance with the law in this respect is absolutely fatal to a tax sale, by a decision which stands unreversed and unmodified, this would seem to be, of itself, conclusive to the same effect; and, if there have been repeated subsequent decisions by this court declaring the same principle, it is difficult to see how this court can be asked to hesitate over the question.

(*d.*) If, still in addition, the result thus arrived at upon the preceding considerations is one repeatedly and universally recognized by all other tribunals throughout the country, the question would seem to be entirely incapable of further discussion.

(*a.*)

That strict and rigorous compliance with all substantial requirements of taxing acts is an essential and indispensable prerequisite to a valid tax sale, is elementary, and so universally recognized that it probably will not be questioned. As illustrative of the authorities declaring the rule may be instanced

Williams *vs.* Peyton, 4 Wheat., 77, 79.
Ronkendorff *vs.* Taylor's Lessee, 4 Pet., 349, 359.
Marx *vs.* Hanthorn, 148 U. S., 172, 180.
Early *vs.* Doe, 16 How., 617-18.
Sargent *vs.* Bean, 7 Gray, 125.
Desmond *vs.* Babbitt, 117 Mass., 235.
Milner *vs.* Clarke, 61 Ala., 258.
Ex parte Thacher, 3 Sneed, 344.

So rigid is this rule, where the question is one of depriving an owner of his property under such a proceeding as a tax sale, that a verdict to the effect that the assessment was in the name of S. M. Whipple, and that the owner's name was S. B. Whipple, "is in legal effect a finding that the property was never assessed to the defendant at all" (People *vs.* Whipple, 47 Cal., 591), although generally, in proceedings less drastic, a second Christian name is immaterial, and not the subject of variance (Keene *vs.* Meade, 3 Pet., 1; State *vs.* Higgins, 27 L. R. A., 74).

So, in Crawford *vs.* Schmidt, 47 Cal., 617, an assessment to "—— Schmidt," it is held, was neither an assessment "in the name of the owner," nor to an "unknown owner," either of

which would have been sufficient, and that the assessment and sale were accordingly void.

In Corporation *vs.* Pratt, 8 Wheat., 681, 687, upon the question whether, where several lots belonging to the same owner were advertised, the advertisement should state separately the amount of the taxes due on each lot, or might simply state the aggregate amount due upon them as a whole, the court said:

"This may be a very immaterial question practically, and it may not be very easy to assign a sufficient reason of policy for the one or the other alternative. But what have we to do with such inquiries in cases of positive enactment? The law must be pursued whatever be the previous steps acquired."

(*b.*)

That the object intended to be accomplished by the statute is a cardinal consideration in its construction is, also, too elementary to be questioned; and that the object of the very common requirement in the tax laws throughout the country that the assessment, advertisement, and sale shall be in the name of the owner is that the latter may thus have the "most awakening" or effective notice before he is deprived of his property, has been, as above stated, expressly declared by this court in—

City of Washington *vs.* Pratt, *supra.*

Ronkendorff *vs.* Taylor's Lessee, 4 Pet., 349, 362.

(*c.*)

In the third place, this court, in the above-cited case of City of Washington *vs.* Pratt, 8 Wheat., 686, has declared, in terms, that, where the statute requires the assessment to be in the name of the owner, failure of the taxing officers to assess in that name is absolutely fatal to the assessment, and to any sale under it.

A most painstaking effort was made below, and is renewed at pages 78-81 of the Brief for the Kanns, to escape the effect of this plain and direct decision of the court of last resort, by seeking to discover points of difference between the two cases. These points of difference, divested of phraseology and argumentative ingenuity, amount only to this: That, in the Pratt case, the tax law covered only the case of absentees or non-resident owners; that the case arose at an early stage in the history of the city, when, as was said below, "the design of the city on paper was not completed;" that the power of sale was restricted to a single class of property, namely, unimproved lots upon which taxes were for two years in arrears, and the length of time required for the advertisement varied accordingly as the owner resided beyond the United States, or within the United States but without the limits of the District of Columbia, or within the District. No other points of difference were suggested, or exist.

The unanswerable objection to these attempted distinctions is that the decision of the court has no reference whatever to any of them, but is, in terms, founded upon the broad principle that a direction by Congress to assess the property in the name of the person "to whom it belongs" is a direction to assess in the name of the owner; that, however inconvenient or difficult it may be in some cases for the taxing officers to comply accurately with this requirement, it must be complied with in order to effect a valid sale; that the object of the requirement is to give the owner notice, in this most effective form, of the danger to his title, and that this duty, thus imposed by Congress, cannot be relaxed by the courts, but by Congress alone, if found too rigorous.

To this it is to be added, not only that this decision has never been in any instance either reversed or modified, however slightly, but that, wherever the same or a similar question has since come before the court, it has, in effect, fully reiterated the same conclusions.

Bird *vs.* Benlisa, 142 U. S., 669-70.

Marx *vs.* Hanthorn, 148 U. S., 183-4.

In Marx *vs.* Hanthorn, the language of the statute was not, as in the case at bar, specific upon the point that the assessment and advertisement must be in the name of the real owner, but the court say:

"We agree with the court below in thinking that the reasonable meaning of the statutes regulating notices and sales of property for taxes is that such notices and advertisements should give the correct names of those whose property is to be sold. While the statutes do not in terms say that the names of the owners should be published, yet such would seem to be the fair presumption," etc.

In the brief for the Kanns, after referring at page 71 to the act of May 15, 1820, providing that the recorder of deeds and register of wills should annually furnish the proper officer of the District with correct lists of the transfers of real property in the city of Washington, "so far as can be ascertained by the records in their respective offices," it is urged, at page 71 *et seq.*, that the assessor is not bound to go beyond what appears of record as to the title. This, however, is inconsistent with the very terms of the statute, which requires, specifically, the recorder and register to furnish correct lists, only in so far as can be ascertained from their records, without repealing or modifying the requirement that the assessment should be in the name of the owner, which requirement has been reiterated in each of the acts of Congress upon the subject subsequent to 1820.

See City of Washington *vs.* Pratt, 8 Wheat., p. 685, decided in 1823 and quoted *infra.*

(*d.*)

In the fourth place, the absolute and incurable invalidity of any assessment and sale in the name of any person other than the owner, where the law requires it to be made in the owner's name, is affirmed by the decisions to be found upon the subject throughout the various States of the Union.

The researches of the able and industrious counsel for the Kanns, at the argument below and here, discloses but two cases which they themselves consider it possible to cite as maintaining, by analogy even, a contrary doctrine. These decisions are Dickinson *vs.* Reynolds, 48 Mich., 158, and Moale *vs.* Baltimore, 61 Md., 224.

In Dickinson *vs.* Reynolds, the court, reversing a ruling below that an assessment to "the estate" of a deceased owner was invalid, does so only upon the ground that—

"the estate was at that time undivided, and the *statute*—Comp. L., sec. 976—*permitted* lands to be assessed to the heirs or devisees *without naming them.* Assessing it to the estate was, in legal effect, assessing it to unnamed heirs."

The utter want of any analogy between the law of that case and of the case at bar, or between the facts of the two cases, is apparent. In the Michigan case, the land was undivided, and the law, in terms, permitted it to be assessed to the unnamed heirs; while, in the case at bar, the land had been for twenty-five years in the possession and fee-simple ownership, in severalty, of Mrs. Kennedy, and the law under such circumstances required it to be assessed in the name of the owner. In the Michigan case, the assessment was to "the estate" of the deceased former owner, a form of assessment held by the court to be in legal effect an assessment to the unnamed heirs, which the law authorized; while in the case at bar the assessment was to "Maria T. Gillis," which could by no possibility be treated as in legal effect an assessment to the estate of the deceased owner, even if the statute here were the same as in Michigan.

The Maryland case, Moale *vs.* Baltimore, was a suit, not to determine the validity of a sale, but to enjoin a sale for a special improvement tax. It was not the case of an attempt to deprive the owner of his property by a tax sale conducted without giving him the notice or warning required by law, but a suit by the owners, before sale, and disclosing notice and full knowledge, on their part, of its

danger, the object being to relieve themselves of their obligation to pay their just proportion of a special improvement tax, not upon any meritorious ground, but solely because the assessment had been to the estate of the ancestor from whom they had inherited the property, instead of in their individual names.

It is manifest that neither of these two cases affords any support to the validity of a sale, already made without the owner's knowledge, and without the notice to him required by the statute; and, as stated, they are the only two to which the learning and diligence of counsel have led them, capable, argumentatively even, of being presented to the court as analogous. On the other hand, the text books and the reports abound in decisions, without exception uniform and harmonious, to the effect that a sale under such circumstances is absolutely void. We shall cite only such as are analogous to the case at bar in a particular which was urged below as properly distinguishing it from cases of assessment in erroneous names generally, namely, cases in which the assessment was made in the name of a former but deceased owner.

In L'Engle *vs.* Wilson, 21 Fla., 461, the tax deed was based upon an assessment to "Estate of C. Parkhurst," Parkhurst being then dead and the property in the possession and hands of his executor. *Held*, that this was not an assessment to the "owner, occupant, unknown owner or person in a representative capacity," as provided by the statute, and that the tax sale was therefore void. This case is cited by this court in the case of Bird *vs.* Benlisa, 142 U. S., 664.

So, in L'Engle *vs.* Railroad Co., 21 Fla., 358-9, also cited in Bird *vs.* Benlisa, the court says:

"The tax is a lien on the land *only when legally assessed*. 'The lien attaches and has relation to the time at which the assessment was made.' 18 Fla., 289, Spratt *vs.* Price. We hold that a valid assessment of the land in accordance with the laws regulating the assessments, chap. 3099, Laws of Fla., Acts of 1879, is necessary and indispensable to make

good the title of a purchaser at a tax sale; without such assessment, no lien attaches to the land. An assessment, therefore, to a person other than the owner, such person not being the occupant thereof, is not a valid assessment, and the purchaser at a tax sale based on such assessment takes no title."

In Fix *vs.* Dierker, 30 La. Ann., 175, the assessment was in the name of a deceased husband and father. It did not appear that he had ever been the owner; but it did appear that upon his death his property, if he owned any, had passed to his legal representatives. *Held,* that, there having been, in either event, no assessment against the true owner, the tax sale was void.

In Smith vs. Davis, 30 Cal., 536, the statutory provision was that the assessment should show "the name of the owner of each lot or portion of a lot assessed, if known, or if unknown, to be so stated." The assessment was in the name of D. C. Broderick, who had been the owner, but had been dead for several years. The report of the case shows that the assessor knew of Broderick's death, though, of course, the right to have notice by advertisement in the owner's name could not be varied or made to depend upon the personal knowledge or ignorance of the assessors. The court, after stating that a dead man could not be the owner, adds:

"That such an assessment imposed no obligation upon the defendant is too plain for argument. He can be made to pay only upon its being shown that the steps of the statute *have been strictly followed.* * * * An assessment to a person long since dead, or to a person not the owner, is not in any sense a compliance with the statutory mode, and is therefore without any binding force."

In Sharpe *vs.* Spier, 4 Hill, 76, 89, the action was ejectment to recover land which one John Sharpe had conveyed to his mother, who had died leaving him her only heir-at-law, and had devised all her property to his children. The

tax was assessed in her name, she having died only two years before the assessment. The court said:

"At the time these proceedings were commenced, the land belonged to the seven minor grandchildren of Mary Sharpe, who are the plaintiffs in this action. The fact that Mrs. Sharpe has been long dead enabled the collector to make the necessary affidavit that she could not 'upon diligent inquiry be found in said village.' Had the plaintiffs, the owners of the land, been named in the assessment, there is no reason to suppose that the necessary affidavit could have been made, or that the tax would not have been paid, and the land saved. The assessment neither created a charge on the land, nor a debt or duty upon the plaintiffs. * * * On each and all of these grounds we are of opinion that the sale was void, and conferred no title on the purchaser."

In Whitney *vs.* Thomas, 23 N. Y., p. 285, it was urged that if the assessors made inquiries and assessed according to the best information they could obtain, their action was judicial and could not be impeached in any collateral proceeding. This the court declared to be erroneous. "The assessors have no jurisdiction to assess except as the statute prescribed; and, unless they pursue the directions of statute, the assessment is unauthorized and void."

So, in the case at bar, it is urged that, if the land was assessed in the name of the last record owner, it should be held sufficient; but this position is wholly untenable. The statutory requirement is that, except only in the case of property belonging to an undivided estate and which has been divided according to law or come otherwise into the possession of the owner, and except in the case of an unknown owner, in which case the land must be assesed "owner unknown," the assessment shall be in the name of the owner.

The statute declares that all real property shall be assessed in the name of the owner or trustee or trustees of the owner thereof. The proposition of the defendants is to substitute for this language of the act the following: "All real prop-

erty shall be assessed in the name of the *last record* owner." The proposition, to be refuted, needs but to be stated.

The exception to the exception contained in the act, namely, the case of property which has come into the possession of one otherwise than by legal division of a decedent's estate, shows that Congress recognized, and intended to provide for, cases of ownership not evidenced by usual legal procedure. This court had declared, repeatedly, that a title by adverse possession, for example, was as legally perfect and complete as if obtained through a deed from the last record owner.

Harpending *vs.* Dutch Church, 16 Pet., 492.
Leffingwell *vs.* Warren, 2 Black, 599.
And see Dicherson *vs.* Colgrove, 100 U. S., 583.

The courts of this District have repeatedly permitted recoveries in ejectment upon such titles, and have sustained them as valid defenses to suits brought by the holders of the record title, contrary to the view urged below that a record title is in all cases sufficient to enable the holder to recover in ejectment, and that purchasers for value are permitted to rely upon the record as to the ownership of real property. The position contended for, namely, that assessment in the name of the last record owner is the only requirement of the provision that *all* real property shall be assessed in the name of the owner or trustee or trustees of the owner thereof, would deprive that considerable number of persons who hold valuable real estate by adverse possessory titles and the like of that warning by assessment and advertisement in their own names which this court declares was the object of the statute. Indeed, the argument here is that every person who happens to be the sole heir of a deceased owner of real estate should be so proved and for all time, notwithstanding the express letter of the law, and its plain object and meaning as declared by this court (Brief for Kanns, pp. 71-3).

In Wood *vs.* Torrey, 97 Mass., 322–3, the statute authorized the assessment of personal taxes against the owner, or, in case of his decease, generally against his estate, until the appointment of an executor or administrator, and, after such appointment, to the executor or administrator until that officer should give notice of distribution. The defendant was made administrator in 1863, and the assessment was made in 1864 to "Estate of Benjamin Davenport," the testator. It was held utterly void. This, it is true, was a case of tax on personalty, but the reasoning and principle are the same.

In State *vs.* Collector of Jersey City, 24 N. J. L., 108, the proceeding was to vacate by *certiorari* an assessment to "Estate of J. B. Coles." The statute prohibited relief "for any lack of form which does not impair the substantial rights of the plaintiffs." The court held that the relief prayed must be denied, under this provision of the statute, because, as the tax could not be collected of the heirs personally, owing to the defective assessment, and because no good title to their land could be made by the sale under it, their substantial rights were not impaired.

In Cruger *vs.* Dougherty, 43 N. Y., 107, 118–20, the assessment was against "John Kortright, other legal heirs of John Kortright, deceased, or their heirs or assigns." The John Kortright thus named was a son of "John Kortright, deceased," and had himself been dead for five years before the assessment. The court said:

"Is the statement made here any better than if none had been made as to the names of the persons? * * * It cannot be pretended that it was sufficient to name him who had been dead five years."

To similar effect is Carlisle *vs.* State, 78 Ala., 486.

In Sawyer *vs.* Mackie, 149 Mass., 269, all proceedings necessary to the validity of the tax deeds in controversy were complied with except in regard to the name in which the assessments were made, the assessment being in the name

of John O. Bradford, who had owned the property for about seventeen years prior to his death. At the date of the assessment there was no record of his death, no probate proceedings had been instituted upon his estate, no evidence that the assessors had notice of his death, the title stood in his name upon the records of the office of the register of deeds, and the statute provided that, for purposes of assessing and collecting taxes, the persons appearing of record as owners should be held to be the true owners thereof. The court, at page 270, say:

"The natural and obvious meaning of the word 'person' is, living human being. When the statutes speak of a person who has died, they speak of him as a 'person deceased' or a 'deceased person.' A dead man cannot be an owner of property. We see no reason to suppose that the statute above cited intends to use the words 'persons' and 'owners' in any other than the usual sense. * * * We are, therefore, of opinion that the assessment of the taxes upon the premises in question for the years 1884 and 1885 to J. O. Bradford, who died in 1879, was illegal, and that the spperior court rightly directed the verdict for the tenant."

In the light of the authority last cited, the contention of the appellants that the payment of former assessments for many years in the name of Maria T. Gillis is in the nature of an estoppel cannot stand. So in Cruger *vs.* Dougherty, 43 N. Y., 107, 118–20, the court say:

"It is also urged that these persons are estopped from questioning this tax now, because they have been assessed in this form for eighteen years prior to this assessment, and have always paid it. The payment of a tax for any number of years without legal proceedings, will not give validity to such proceedings when they are questioned, if taken without authority of law."

Still less is such an objection tenable as against the complainant in this case, who had but recently acquired the lease, and whose interest is sought to be sacrificed through

the instrumentality of this tax proceeding. How is she estopped?

In the case at bar, it will be noted, not even the position of the defeated tax claimants in a majority of the foregoing cases is presented. The assessment in this case is not to the estate nor to the heirs of a deceased person, but to *Maria T. Gillis*, the bill alleging, the answers admitting, and the evidence showing that Marianne A. B. Kennedy had been for more than twenty-five years the fee-simple owner, in severalty and in possession for thirty-one years, to be exact (Kanns' Brief, p. 73).

So far from *record* notice of a change of ownership being essential, for any purpose, Mrs. Kennedy's possession would have been sufficient, even as against an innocent purchaser from a record owner, without notice (U. S. *vs.* Howgate, 2 Mack., 408).

Even had it been claimed in the pleadings, or in the evidence, that the assessors made a *bona fide* attempt to obtain the name of the actual owner, and had been unable to do so, it would have availed nothing. No attempt is made to show such an effort, and the Brief for the Kanns, at page 71, contents itself with the claim that none was necessary; but, if shown, it would have been wholly immaterial. Where the statute requires the name of the owner to be stated the requirement must be complied with:

"It was undoubtedly in the power of Congress to have left what latitude they pleased to the assessor in designating the owner; but, if they have confined him to the necessity of determining the true owner, it is not in our power to enlarge his discretion. It may be a hardship upon the corporation, but the legislature only can decide whether that hardship shall be perpetuated or not. * * * Had Congress intended to lighten the labors of the corporation, or their assessor, in this respect, there were very simple means of doing it; they might have sanctioned a designation with respect to the first or last vendee of record" (City of Washington *vs.* Pratt, 8 Wheat., 685).

And yet, at page 71 of the Brief for the Kanns, this is precisely what is now claimed to be the law, *without* such an act of Congress.

This decision in City of Washington *vs.* Pratt was in 1823; and, as must be assumed, with knowledge of the law as thus declared by this court, Congress has perpetuated the requirement in question, down to the present time.

In Desmond *vs.* Babbitt, 117 Mass., 233, 234, in which case the assessment was made in the name of one who had been the owner until about four years previously, the court said:

"If, with reasonable diligence, they cannot obtain trustworthy information, they would be justified as taxing it as the property of the unknown proprietor; but they would not thereby acquire the right to tax it to a person by name who was neither the owner nor the occupant."

So in *Ex parte* Thacher, 3 Sneed, 344, in which case the collector had reported his inability to ascertain the owner, and, there being no statutory authority to assess in the name of the unknown owner, the court said:

"This statute is imperative, and its meaning cannot be misunderstood. To give validity to the proceeding, it is essential that its requirements should be complied with. As the statute has not made an exception, authorizing the omission of the name of 'the person to whom granted, or in whose name entered' (either would be sufficient), or the number of the town lot, where these facts are not within the knowledge of the collector, the court can make none. Should it be thought necessary to dispense with these requirements, the legislature has the power to do so; the court has not."

2.

THE FAILURE TO FILE THE COLLECTOR'S REPORT.

In the second place, under the present subdivision of this brief, it is submitted that the tax sale is invalid because of

the failure of the collector of taxes to file his report of the sale in the office of the recorder of deeds, as required by law. Such a filing, contrary to the claim at page 95 of the Brief of Kanns, is a prerequisite to the validity of the sale, and although a condition subsequent to its fulfillment, is as necessary as that of conditions precedent to the act, in order to validate the sale (Blackwell on Tax Titles, secs. 641, 644, 653, and citations; King *vs.* District of Columbia, MacA. & Mackey 36; Beale *vs.* Brown, 6 Mackey, 574, 578–9; Sumner *vs.* Sherman, 13 Vt., 609; Giddings *vs.* Smith, 15 Vt., 344, 357; Carpenter *vs.* Sawyer, 17 Vt., 121–124; Judevine *vs.* Jackson, 18 Vt., 470, 472).

"That this portion of the statute should be strictly complied with, in order to protect the title under sale, from the course of decisions on this subject there can be no doubt" (Lane *vs.* James, 25 Vt., 481, 486).

"For the purpose of giving effect to the deed, and vesting the title, the filing of the report must be treated as a condition precedent (citations). The purchaser is bound to see that the law has been complied with, and the report cannot now, after the period of redemption has expired, be amended" (Jenkinson *vs.* The Auditor, 104 Mich., 34, 37).

"He who wishes to obtain an estate worth $1,000 for less than $10.00, under and by virtue of the law, is not to be permitted to ask why he should be required to do this or to do that. It is an answer that it is required by law. *Ita lex scripta est.* He claims by the law, then by that law let his pretensions be judged" (Reed *vs.* Morten, 9 Mo., 879; Donohoe *vs.* Hartless, 33 Mo., 335, 336).

The filing of the report is, therefore, a condition precedent to the validity of the sale, and this requirement of the law is not complied with by temporarily depositing the report with the recorder of deeds and subsequently taking it away again—long prior to the expiration of the time allowed by law for redemption from tax sales (Record, pp. 229, 471).

A paper is "filed" when it is delivered to the proper officer and by him received to be kept on file (Bouv. Law. Dict. and citations).

A leading case upon the subject is Medland *vs.* Linton, 60 Neb., 249. The statute requiring the treasurer to file in the office of the county clerk of his county a report or return of tax sales made by him, and the treasurer having attempted compliance with this requirement by taking the return to the office of the county clerk, and afterwards receiving it from that officer and taking it back to his own office, the court said:

"This in our judgment is, neither in letter nor spirit, a compliance with the sections of the statute referred to. * * * The law requires that this return, or report, shall be filed in the office of the county clerk. * * * 'A paper is said to be filed when it is delivered to the proper officer, and by him received to be kept on file' (Bouv. Law Dict.), and the derivation and meaning of the word, as defined in the dictionaries, carries with it the idea of permanent preservation; becoming a part of the permanent records of the public office where it is filed.

"Filing a paper, *ex vi termini*, means placing and leaving it among the files. The memorandum endorsed by the officer in whose custody it is placed, is merely evidence of filing, and not the filing itself. Where the paper is required to be filed only for a specific purpose, or to remain on file for only a limited time, the special or limited character of such filing is usually indicated by the statute. Thus in par. 31, chap. 31, of the R. S., entitled, Conveyance, deeds and other instruments relating to lands are spoken of as being 'filed for record.' There the filing is for the mere purpose of being recorded; when that is accomplished the instrument may be properly withdrawn from the files."

To like effect is Gorham *vs.* Summers, 25 Minn., 81, 83; People *vs.* Peck, 67 Hun., 560; Wingfield's Adjudged Words and Phrases, 261, 262.

It is respectfully submitted that for no purpose, and still less for the purpose of compliance with the rigid requirements of the law in respect to tax sales, can either the depositing and withdrawing of this paper from the office of the recorder of deeds, where the law directed it to be "filed," nor the disconnected, fragmentary, uncertified, and unintel-

ligible copy of it assumed to be made in the office of the recorder of deeds, without legal warrant, be regarded as sufficient.

The claim first made in the Court of Appeals, that the bill does not allege the withdrawal of the report from the recorder's office, is without merit. The bill (Record, p. 10) alleges that the law required the report to be filed with the recorder of deeds, and that *the only report* was the fragmentary entries in the three Libers specified, which, apart from the irregularities pointed out, the complainant would not concede to be a valid, legal report.

3.

THE DEFECTIVE CHARACTER OF THE REPORT.

In the third place, in the present connection, the report, even if filed as required by law, is fatally defective in the following particulars:

(*a.*) If the alleged copy of the report, made by the recorder of deeds as above set out, can be considered as the report, it is invalid, because separated into three portions, copied into Libers which are not consecutive, the second of them, containing the only reference to the property in controversy, being without any certificate of its character, or of reference to the first Liber containing such certificate, or of any entry connecting it with the first Liber, except a memorandum at the top of the page, "Real-estate tax sale, District of Columbia, April 12 to 19, 1899." Other than this, there is no certificate or explanation whatsoever, and what is actually the import or meaning of the contents of the second Liber, as of the third, is left wholly to conjecture and inference—the law being that, in cases of this character, nothing must be left to conjecture or inference.

Thus, in Woods *vs.* Freeman, 1 Wall., 388, numerals in a column, intended to indicate money but without a dollar

mark or other indication plainly denoting it, were held insufficient, and the tax sale void; and to like effect are Lawrence *vs.* Fast, 20 Ill., 340, 342; Lane *vs.* Bommelmann, 21 Ill., 147. This defect, also, exists in the present case (Record, pp. 160–1).

The proof in respect to compliance with the requirements of the law in the matter of tax sales "must be affirmative and certain, and not left to conjecture and inference" (County Commissioners *vs.* Clark, 36 Md., 206).

Abbreviations made and understood by the persons in the tax and probate offices, who made up the tax list, are insufficient. There must be no vagueness (Smith *vs.* Cox, 150 Ala., 503, 509; Keane *vs.* Canovan, 21 Cal., 291, 302-3, Field, C. J.).

A book in the required office of the court, under the caption "Lands sold for taxes, January 3, A. D. 1876," without signature, certificate, or authentication by the sheriff, is insufficient (Mason *vs.* Banks, 59 Miss., 447, 449). In this case, the law required a list "certified by the collector," while in the case at bar the requirement is that the collector shall "give a statement," etc.; and, as stated, there is nothing in the Liber referring to sublot A, square 432, to show that the statement is made by the collector, or by any other person, nor is there a reference to any other Liber or record showing such fact.

The statute providing for the filing of the collector's report with the recorder of deeds, approved February 28, 1898 (30 U. S. Stats. at L., 250, 252), under which this sale was assumed to be made, requires that it shall state the following:

(*b.*) To whom the property was assessed. As will be seen by reference to the copy of the report in evidence (Record, p. 234), this requirement is not complied with, except inferentially and conjecturally, which, as above shown, is insufficient in the case of tax sales.

(*c.*) The taxes due. As to this requirement the report is wholly silent.

(*d.*) To whom sold. As to this requirement, under a column headed "Purchaser," the report contains only the word "Do." As to the first piece of property described on the page, the name "C. H. Wiltsie" appears in the column. As to the second piece sold, there is only the word "Do." As to the third piece sold, "Do." again appears as the purchaser. As to the fourth piece of property sold, "C. H. Wiltsie" appears in the purchaser's column, and as to the remaining piece, "Do." That "Do." does not stand for C. H. Wiltsie would seem to be apparent from the fact that where Wiltsie is purchaser his name appears in full, unless "Do." and "C. H. Wiltsie" are intended to represent, indifferently, Mr. Wiltsie, as to which we can resort only to the sources of information excluded by the authorities above referred to, namely, inference and conjecture.

It is to be assumed that the purpose of requiring the collector to set forth the name of the purchaser, or at least one of the principal purposes, was to enable the owner to ascertain who had bought his property, and to redeem it from such purchaser. The entry, as contained in the report, gives no information.

(*e.*) The amount paid. As to this requirement, also, there is an entire failure of compliance with the statute. Under the column headed "Amount sold for" appear "128 50" as the "2. half tax for year 1898"; "14 13" as "penalty," and "1 20" as "advertising." From which we may perhaps conjecture or infer that it would have required the sum of these items, "143 83," to discharge the claims of the District authorities; but whether the property was sold for this sum or for a larger or a smaller one, and whether "143 83" means $143.83, the report is entirely silent.

(*f.*) The date of sale. As to this item, also, the report gives no information. It does inferentially, perhaps, indicate that the first property referred to on the page in question was sold on April 13; but whether the remaining pieces

of property upon that page were sold on that day, or upon some other, is not disclosed.

(*g.*) The cost of sale. Here, too, except that the advertising fee is indicated to have been "1 20," the report is destitute of information. What other items of costs there were, or what was the total cost, is left in darkness.

(*h.*) The surplus, if any. As in all preceding particulars, the report is wholly silent as to whether there was or was not a surplus; nor, in view of the omission to state the amount for which the property was sold, and the cost of the sale, is any data supplied by which the owner, or the public, could determine whether there was or was not a surplus.

That these omissions are fatal is clear, not only upon the general principles already discussed and supported by the authorities cited, but by specific decisions of the courts.

Where the return was required by the statute to show the "estate held, the name of the county, the month and the year of the sale," but it omitted those items, the court said:

"This act of the legislature prescribed the terms upon which realty may be sold for taxes and the owner divested of his title. Should not every positive requirement of it be regarded as material, to be strictly complied with? * * * There would seem to be but one answer to this question. If he [the officer conducting the sale] can omit any positive requirement of the statute, he may omit all, and thereby arbitrarily divest any owner of his title to realty in arrears for taxes" (De Forest *vs.* Thompson, 40 Fed. Rep., 375; Brackstone *vs.* Rich, 47 Fed. Rep., 178, 190).

"If there are omitted from the list some of the positive requirements of the statute, can it be called a mere irregularity which will not affect the sale? To say that the legislature has enacted that certain proceedings are necessary to the validity of a sale of real estate for taxes, and at the same time to say that omission of any of such proceedings is mere irregularity, is absurd. If any of such proceedings may be omitted, why not all? How can we say which is material

and which is not? The legislature prescribes the rule, not the court; and we must regard all the requirements of the statute alike essential" (Jones *vs.* Dils, 18 W. Va., 759).

The defects above enumerated appear in the copy of the report as transcribed into the records of the office of the recorder of deeds (Record, p. 234). With the exception of defect *a*, they appear equally in the report itself, withdrawn from that office by the collector and now in his possession (Record, p. 160).

The Court of Appeals held the invalidity of the tax deed to be so clear from the fact that the assessment and sale were in the name of another than the owner, and from the failure of the report of the sale to state the amount of taxes due, the cost of the sale or the amount for which it was made, that it was unnecessary to consider, even, any of the remaining objections to its validity (Record, pp. 489-90), and, we submit, was unquestionably correct in so holding. It follows, as the court further held, that the matter stands as though the tax certificate and deed had never been issued.

"The situation, therefore, is that there are taxes upon the property in arrears, due and unpaid, for which the lessee is liable, and for the failure to pay which the lessor seeks to enforce a forfeiture of the lease. And the lessee, claiming that the failure to pay at the proper time was an inadvertence or misadventure, offers to pay them, and seeks to be relieved from the forfeiture or threatened forfeiture."

And the court, at page 491, then proceeds to point out, not only that the default occurred when the lessee was in the midst of bereavement and financial trouble and distress caused by and accompanying the death of her husband, but adds that, as shown by the statement of facts prefacing this brief, the lessor was as responsible as the lessee, if not more so, for that default.

"The testimony shows quite conclusively that, while the lease required the annual taxes on his property to be paid by

the lessee, yet the invariable custom of the lessor down to the time of the default had been to demand and receive the amount of the taxes from the lessee, and to pay the taxes herself by her own agents. For the taxes for the second half of the year 1898, in connection with which the default occurred, the lessor, for some reason, failed to make the usual demand for the money wherewith to pay the taxes. * * * The record shows to us quite plainly that the default of the lessee was excusable under the circumstances; and that no harm would be done to any party by her relief from the nominal forfeiture which she has incurred."

II.

The invalidity of the tax deed seems so manifest that little time will be devoted to the further question whether, if valid, the circumstances under and the purposes for which it was acquired are not such as, in a court of equity, to preclude the appellants in case No. 202 from asserting it, and to entitle the appellee and the appellant Webb to relief against it.

While the fact that there had been a tax sale was first communicated to the Kanns, and by them to Cohen, through a tax practitioner, Knight, the information thus given was simply that there had been a tax sale, and not that the sale had become irredeemable by lapse of time. It was "a bare statement of something that might be true, and might not be true, and I [Cohen] was not going to meddle with it at all" (Record, p. 381). The fact that the tax sale was irredeemable was acquired from Mr. Webb by Mr. Cohen on September 30 (Record, p. 381), and it was this information which led him to conceive the idea of purchasing the tax certificate as a "club that I might use, as necessary, as against either Mrs. Kennedy or Mrs. King" (Record, p. 382), being aware of the fact that the tax sale certificate would not be a club over the head of any one except for the fact that it had become irredeemable (Record, p. 382).

The law applicable to this evidence in the case is thus laid down by this court in Michoud *vs.* Girod, 4 How., 554:

"Trustees (unless they are nominally such to preserve contingent remainders), agents, commissioners, creditors who have been consulted as to the mode of sale, *and any persons* who, by their connection with any other person, or by being employed or concerned in his affairs, have acquired a knowledge of his property, are incapable of purchasing such property, excepting under restraints which shortly will be mentioned"—

the exceptions referred to having no application to the facts of the present case.

The information thus derived from Mr. Webb of the irredeemability of the tax certificate was obtained from him in the negotiation for the proposed lease from Mrs. Kennedy to the Kanns, and after Mr. Cohen had informed Mr. Webb that his clients, the Kanns, would take the lease (Record, pp. 381-2). It was only upon the information obtained from Mr. Webb that the tax certificate was irredeemable, and that Mr. Wiltsie held it, that he conceived the idea of purchasing this tax title, "because of the fact that I wished to be in possession of a club that I could use, as necessary, against either Mrs. Kennedy or Mrs. King," and he believed that the certificate was a club, or would prove so, because it was irredeemable (Record, p. 382). The provision of the lease for forfeiture if the taxes were not paid, he testifies he knew long prior to September 30, though declaring himself unable to state how he knew it (Record, p. 389), the only opportunity or occasion for acquiring such knowledge, in so far as the record discloses, being the fact that the original lease had been acknowledged before him, and the several extensions of it drawn by members of his law firm (Record, pp. 389-92), which firm were never attorneys for the lessor (Record, p. 391), but had been attorneys for the lessee in various matters, including the extensions of the lease in controversy (Record, p. 423).

As pointed out in the statement of facts at the beginning of this brief, the anticipated necessity for a "club" arose from the fact that on a former occasion Mrs. Kennedy had at the

instance of her tenants receded from some concessions which she had promised the Kanns in regard to the property, and it was to prevent any relenting in favor of the Kings in the matter of forfeiture that the club was to be utilized (Record, p. 423); and, when it was learned from Mr. Webb, on October 8, that Mrs. Kennedy had relented and was intending to allow the Kings to continue in possession (Record, p. 414), the club was put into commission or exercise on the following day (Record, pp. 408-9) by the announcement to her representative that, if she did not eject the Kings and give the Kanns a lease, the tax title would be held adversely, that she must take the consequences, and that her property might be taken from her (Record, p. 319); and it was with this club in hand that Mrs. King was asked to acquiesce in a judgment by default against her for possession of the property, in favor of the Kanns, upon terms of money being left upon a table or elsewhere which might be "found" by her attorney, thus avoiding the difficulty created by the then pending equity suit to subject the lease to payment of her husband's creditors.

At pages 166-7 of the brief of appellant in No. 203, the cross-examination of Mr. Webb to elicit the fact that the irredeemability of the tax title was communicated by him to Mr. Cohen, his deposition having preceded that of the latter, is declared to be irrelevant, that this information was only what Mr. Cohen might have obtained from the public records, and included nothing which he did not subsequently verify at the office of the title company. But, however accessible from other sources may have been this information which led Mr. Cohen to conceive the plan of purchasing the tax title, for the purpose so picturesquely and candidly described by him, the fact remains, as testified by himself, that the plan *was* conceived in consequence of the information given him by Mr. Webb in the negotiation for the lease and after he had informed Mr. Webb that his client would take it, that the tax title had become irredeemable, without which

circumstance he knew it would not be available as a club (Record, pp. 381-4). No such suggestion had been conveyed to his mind by the information from Mr. Knight of the mere fact that the property had been sold for taxes (Record, p. 380), although he had "been for some time trying to get a lease of these premises for the Kanns," and though his purchase of the tax title, after learning of its irredeemability, was with the expectation of forcing the Kings out of the property and of being able to put the Kanns into possession of it.

"Q. * * * I ask you once more if it is not true that the fact which conveyed to your mind that this tax certificate would be a club over Mrs. Kennedy's head first came to you through Mr. Webb's informing you that the tax certificate was irredeemable? A. I have stated again and again that the fact of the irredeemability of this tax certificate came to me from Mr. Webb, and I repeat it.

"Q. It came to you in a treaty between you and him for a lease from his client to your client. Is that true? A. That depends upon your use of the word treaty.

"Q. Call it negotiation. We are not splitting words here. A. It came to me as a statement from Mr. Webb after I had informed him that my client would take the property at $300.00 per month.

"Q. It came to you from him in the course of negotiations between you for a lease to your client from his client, did it not? A. If you call them negotiations, yes, sir.

"Q. Is it possible for you to say yes or no to that question? A. I think the proper answer to that question is yes" (Record, pp. 383-4).

No authority, it is believed, has ever existed for the proposition that information, thus obtained, can be taken advantage of for the purpose of purchasing a title adverse to that of him from whom it was obtained, on the ground that the same information might have been, but was not, gotten from public records or other sources, if it had occurred to the party to seek it there; and, if so, not only is the fact thus proved not open to the charge of being irrelevant, but it strongly—

it is submitted, conclusively—defends against the tax purchase of title to the property which the appellant in No. 203 is charged with the duty of defending, and in performance of which duty, ordinarily, it would be reasonable to expect to find him engaged. The claim in his brief that the tax title was gotten out of the way by a compromise of October 9, 1901, would seem to be distinctly denied by the answers (Record, pp. 46, 48, 68, 68-9, 69, 81), and by the appeal throughout the case by and on behalf of the appellant Webb that the complainant should not be permitted to compel him to jeopardize the title to this valuable property by being granted the restraining order *pendente lite*, and later the injunction, which would prevent him from saving the property by acceptance of terms then available, but which otherwise might be irretrievably lost, which arguments against the relief prayed are reiterated, even in this court of last resort, whose decision will forever put an end to all possible jeopardy, if any exist, in the Brief for Kanns, pages 62-3.

"This defendant deems it of the highest importance that we should not imperil the estate of his testatrix by litigation touching the validity of said tax sale, when he is able to secure an amicable compromise of the claims of the owners of the tax title without loss or injury to the said estate" (Webb's answer, Record, p. 84).

This was the burden of the argument on his behalf throughout the lower courts, although, if the statement of his brief is correct, the compromise which the answer represents him as then "able to secure" had already been secured, and the tax title "gotten out of the way," six months and more before his answer was filed. Upon the representations of his answer and on his behalf at the argument, the court felt bound to require the appellee to give, as the condition of the necessary injunction *pendente lite*, a bond for $40,000, to protect the title represented by the said appellant against the tax title (Record, pp. 106-8), which, it is now stated, had already been compromised and gotten out of the way. And

yet, if the statement in the brief should be regarded as an inaccurate one, we are confronted with the apparently equally inexplicable condition that the appellant has, as is further stated in his brief (p. 183), thereafter "consistently acted with the Kanns and their counsel," and is here contesting the jurisdiction or power of the courts below to render the decree which annuls the tax deed, and frees his title from its alleged peril (Brief for Webb, pp. 89-91).

III.

The charge of multifariousness, it is submitted, is equally untenable. The bill raised no question which did not concern, directly and immediately, each and every of the defendants. The defendant Webb was insisting, not alone upon his right to claim the forfeiture, but that the tax title, which he claimed had accrued through the negligence of the complainant, was a bar to the relief sought by her. The other defendants were claiming, not only that they had secured a title to the property through the tax deed, but that they had, in addition thereto, an agreement for a lease from the complainant's lessor. All were therefore directly interested in both the purposes of the bill, namely, the vacation of the tax title and relief against the forfeiture. Whether the tax sale was valid was a question in which the defendant Webb was vitally interested, and if it were invalid, then his codefendants were equally interested with him in the question whether the forfeiture should be relieved against and the agreement for a lease to them by Mr. Webb's testatrix thereby defeated. As to the appellee, the tax title, if valid, defeated her unexpired term, while if invalid it nevertheless constituted a cloud upon it, which it was within the plain jurisdiction of a court of equity to remove, as well as an ostensible obstacle to her relief against the forfeiture.

The untenableness of this objection is apparent from other points of view, showing the Kanns to have been not only

proper, but absolutely necessary parties to the bill, upon its merits. The rules of equity pleading require that the bill must anticipate and answer all defenses either originally or, if this has not been done, then by way of amendment to the bill. If, therefore, appellee's bill had alleged, simply, the fact that her omission to pay the taxes in question was an unintentional slip, the result of accident and mistake leaving the appellant Webb, by way of answer, to set up the tax sale and the resulting tax deed in the hands of Cohen and the Kanns, it is obvious that this would have been an obstacle to relief, had the pleadings ended there. It would have been indispensable, in such a case, for the appellee to obtain leave to amend her bill, and to show that the tax sale and deed were absolute nullities, interposing no real obstacle to the relief asked. To do in the first instance what otherwise she must have done later by amendment cannot constitute multifariousness.

Multiplicity of suits should be avoided by uniting in one bill all who have an interest in the principal matter in controversy, even though their interests may have arisen under distinct contracts.

Gaines *vs.* Chew, 2 How., 619, 642.

See also:

Oliver *vs.* Piatt, 3 How., 411-12.
Barney *vs.* Latham, 103 U. S., 214-15.
Payne *vs.* Hook, 7 Wall., 432-3.

If the case against one defendant is so entire as to be incapable of being prosecuted in several suits, the objection of multifariousness cannot be allowed to prevail because some other defendant may be a necessary party to some portion of the case stated. It will be sufficient if each party has an interest in some material matters involved in the suit, and they are connected with the others (Brown *vs.* Guaranty

Trust Co., 128 U. S., 412). All parties whose rights or interests would be affected must be made parties.

Hoe *vs.* Wilson, 9 Wall., 501.

McArthur *vs.* Scott, 113 U. S., 391-2.

The appellants Cohen and Kanns are not only affected by so much of the decree below as declares their tax title invalid, but are "equally, though indirectly, injured by the portion of the decree which relieves from and enjoins the forfeiture and prohibits the re-entry of the lessor, because thereby the lessor is prevented from giving a lease to the appellants and carrying out the terms of the compromise" (Brief for Kanns, pp. 17-18). How, then, are they unnecessary parties, or the bill multifarious?

From still another point of view the objection of multifariousness must fail. It would have been contrary to the principles of equity to adjudge, in a suit between appellee and the appellant Webb alone, that the tax title was invalid, and therefore no obstacle to relief, because the decree would have been without effect as against the holders of the tax title, and would have left appellant Webb exposed to the costs and risk of further and independent litigation with them over the same question.

Persons having an interest in the controversy, and who must be made parties to enable the court to act on the rule which requires it to decide upon and finally determine the entire controversy, and to do complete justice by adjusting all the rights involved in it, are necessary parties.

California *vs.* Southern Pacific Co., 157 U. S., 249, 251.

"It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all parties interested in the subject of the suit, so as to make the performance of the award of the court perfectly safe to those who are compelled to obey it, and to prevent further litigation."

1 Dan'l Ch. Pl. & Pr. (4th ed.), p. 190, cited and approved in California *vs.* Southern Pac. Co., *supra*.

IV.

The fourth of the above propositions, it is conceived, requires slight discussion. The tax sale took place, under the circumstances before stated, on April 13, 1899, and the tax purchaser gave no notice of it until the two years allowed by law for redemption had expired. He first brought the matter to the attention of the appellee by his letter of July 24, 1901, followed by the correspondence, at pages 55-7 of the record, between that date and September 24, on which date Mr. Wiltsie's original demand of $294.31 for a tax certificate which cost him $143.83 had been reduced only to the sum of $272.90, or nearly 100 per cent. more than he had paid. The appellee, under advice from her counsel that the tax deed was wholly void, had offered $247.90, and it was at this stage of the case that Mr. Cohen intervened, paid $200 more than Mr. Wiltsie told him he had asked, and acquired the certificate for $500. The negotiation, it will be seen, had extended, in all, a little over two months, with no possible ground to anticipate the course pursued by the appellants, or any of them, and under both an assurance from counsel that the tax sale was a nullity, and a not unnatural reluctance to submit to what was deemed a gross imposition, irrespective of the amount involved. No evidence has been lost, and no conditions have changed, except in so far as appellants themselves have changed them. The natural repugnance aroused by Wiltsie's attempted imposition and demands, in the breast of the appellant Webb himself, or of his counsel, will appear at page 176 of his brief.

We submit that the lower court was justified in its holding that there was no such "delay or laches by appellee as would preclude her from relief in equity," and that the delay, under such circumstances, cannot be held "wholly unreasonable in view of the fact that she had been advised that the sale for taxes was invalid."

V.

The objection most strenuously urged on behalf of the appellant Webb is that the jurisdiction of equity to relieve against forfeitures does not extend to cases where the covenant broken is for the performance of a collateral act, as distinguished from the payment of rent or the like, and that the payment of taxes is such a collateral act.

In the first place, it must be noted that this entire controversy has grown out of the omission of the appellant Webb, or of his client, Mrs. Kennedy, whom the record shows to have largely followed his guidance, to make demand for payment of the taxes before declaring or attempting forfeiture. Of the authorities cited below for the claim that no demand was necessary, Ricou *vs.* Hart, 48 La. Ann., 1370, turned upon the law of that State, making no demand necessary even in the case of rent (Van Rensselaer *vs.* Holbroke, 1 La. Ann., 180); Baldwin *vs.* Rees (Ohio), 8 Am. Rec., 556, is questioned in the later case of Eichenlaub *vs.* Neil, 3 Ohio Dec., 365; and Garner *vs.* Hannah, 6 Duer. 272, 273, while holding that the landlord may have judgment for the forfeiture without prior demand, declares it nevertheless "perfectly clear" that the tenant will be entitled, notwithstanding the judgment, to relief upon the principles of equity against forfeiture. The remaining cases for the proposition that prior demand is unnecessary are Bacon *vs.* Park, 19 Utah, 246; Browne *vs.* Rogers, 8 Minn., 247, and Davis *vs.* Burrell, 10 C. B., 822. As against these, and supporting the proposition that prior demand is necessary, are: Conner *vs.* Bradley, 1 How., 217; Prout *vs.* Roby, 12 Wall., 477; Kansas City Elevator Co. *vs.* Union Pac. Ry. Co., 3 McCreary, 462, 472; McQuesten *vs.* Morgan, 38 N. H., 400; Jackson *vs.* Hermann, 17 Johns., 66, 70; Memi *vs.* Rathbone, 21 Ind., 454, 462; Bowman *vs.* Foote, 29 Conn., 331, 341; Allen *vs.* Dent, 72 Tenn., 676, 680, and Merifield *vs.* Cobleigh, 4 Cush., 178, 184-5.

In the case last cited, there was a grant of land with condition that, whenever the grantee "shall neglect or refuse to support a fence around it, then this deed to be void"—the terms "neglect" and "refuse" being used, also, in the forfeiture clause of the lease in the case at bar (Record, p. 15). The court, by Shaw, C. J., held that such a condition, "when relied on to work a forfeiture, is to be considered with great strictness," and that both the terms "neglect" and "refuse" imply some previous demand, notice, or request, without which the estate cannot be defeated.

It was argued below that prior demand was essential only to the right to distrain; but neither Bowman *vs.* Foote, McQuenten *vs.* Morgan, Conner *vs.* Bradley, Prout *vs.* Robey, nor Merifield *vs.* Cobleigh relate in any way to the subject of distraint.

A legal proposition that the omission to pay the taxes for which the sale was made constitutes a ground of forfeiture against which courts of equity cannot relieve may be discussed, first, as an abstract proposition, and, secondly, under the particular facts of this case.

1.

It is impracticable, within the time in which this brief must be prepared and printed, to discuss and to quote from the authorities, English and American, with the same fullness or in the same detail as has been done in the very exhaustive brief for the appellant in No. 203, nor, it is believed, can it be necessary or useful to the court to do so.

The extract from Platt on Leases in Appendix A to the Brief for Webb gives a very fair résumé of the English cases, and in a manner not unfavorable to the decree appealed from, even if the doctrine of the English authorities were conclusive of the question at issue or in harmony with the American authorities. The original rulings were to the effect that forfeitures for breaches of covenants to repair or the like might be relieved against when resulting from un-

avoidable accident, fraud, surprise, or ignorance not willful, and, according to Lord Erskine in Sanders *vs.* Pope, even though willful if the case were one in which fair compensation could be made (Brief for Webb, Appendix A, pp. 9-13). In Woodman *vs.* Colcroft, 10 Ves., 67, in which case the lessee had refused to repair after notice from the landlord to do so, the case was distinguished from Sanders *vs.* Pope on that ground, and relief denied. In Hill *vs.* Barclay, 18 Ves., 62, Lord Eldon dissents from the further view of Lord Erskine that relief against forfeiture for breach of a covenant to keep the premises in continuous repair might be granted if the tenant placed them in perfect repair before the end of the lease, upon grounds forcibly stated at pages 15-16 of the Appendix; and in Bracebridge *vs.* Buckly, 2 Price, 200, where the breach was of a covenant to expend £1,000 in repairs within twelve months from the beginning of the term, Lord Erskine's view was overruled by a majority of the judges, against a forcible dissent by Baron Wood, the majority opinion proceeding principally upon the view that there were no means of ascertaining the compensation which should be made, or the mode of making it if ascertainable (Appendix A, p. 17).

The result of these decisions, as summarized by Mr. Platt (Appendix A, p. 18), is that "relief against forfeitures incurred by breaches of covenants to repair generally, or to lay out a specific sum in repairs within a certain time, will not be granted unless the omission and the consequent forfeiture be the result of unavoidable accident, fraud, surprise or *ignorance not willful,*" etc.

The only instances of collateral covenants referred to in the opposing brief for breaches of which relief against forfeiture have been denied, or which counsel for the appellee have found, are covenants to repair and to insure, and, even as to these, the authorities are by no means agreed. With respect to repairs, the refusal is placed exclusively on the ground of the inability of a court of equity to superintend

repairs (White & Tudor's Leading Cases, vol. II, pt. 2, p. 2031); while the refusal of relief for breach of the covenant to insure is placed partly upon the ground—hardly appreciable under the conditions of today, when, in connection with mortgages and other contracts, the policies of insurance are issued or delivered to and held by the parties secured—that the landlord is without means of seeing to the observance of the covenant, but must rely upon the tenant for the fulfillment of the engagement (White & Tudor, *supra*, p. 2033), and partly upon the ground that the court is without means of arriving at compensation or damages to be allowed for the breach. On the other hand, the authorities are numerous that a court of equity may determine the compensation, retaining the bill and directing an issue *quantum damnificatus*, if necessary (White & Tudor, *supra*, p. 2024). No such question, however, can arise in a case like the present, since the amount necessary to pay the omitted taxes is a question of computation merely, wholly free from uncertainty or necessity for resort to speculation, or to the judgment of a jury. Upon its payment, which the decree directs and the appellee tenders herself ready to make, compensation will have been made, and the parties restored completely to the former *status quo*.

Covenants to pay taxes are in the nature of covenants to pay money. Giles *vs.* Austin, 62 N. Y., 491-3; McCartey *vs.* Gokey, 31 Iowa, 505. And an action of debt will lie upon such a covenant. Trinity Church *vs.* Higgins, 48 N. Y., 532.

"A covenant in a lease by tenants to pay taxes and assessments is in the nature of a covenant to pay money; and a forfeiture incurred by a breach, therefore, will be relieved against on the same principle." 1 McAdam on Landlord and Tenant, sec. 187.

"The omission in this case [*i. e.*, to make repairs promptly] is not of the same nature as a failure to repair when waste is going on, or to insure. It is a mere failure to pay money, and is much like an omission to pay taxes,

which, in the absence of bad faith, and none in the pleadings or evidence has been charged, and no new rights have intervened, has been held not to bar the lessee from relief." Lundin *vs.* Schoeffel, 167 Mass., 465.

And in Sanborn *vs.* Woodman, 5 Cush., 36, 41, breach of a covenant to pay interest on a mortgage was held relievable, the court declaring:

"There is clearly no distinction in principle or in the authorities between a forfeiture for the non-payment of rent, and the forfeiture in the present case for the non-payment of interest."

Returning to the English cases, as pointed out by White & Tudor at page 2032 in the volume named, where the cause has been surprise or ignorance not willful, even in cases of breaches of covenants to repair, to erect houses, or the like, the court will interfere on compensation being made; and, in one of the principal cases for the doctrine contended for, namely, Hill *vs.* Barclay, 18 Ves., 62, Lord Eldon expressly excepts cases of this character, although the covenant was for repairs. In Green *vs.* Badger, 4 Sim., 101, in which the covenant was to insure, the breach was "willful;" and in Reynolds *vs.* Pitt, 19 Ves., 143, the decision was put upon the ground that, if the lessee, who cannot reimburse his landlord in case of fire, "has willfully and obstinately prevented that insurance, and it has so subsisted for one, two or three years (for where is it to stop?), upon what principle is a court of equity to say that a tenant who has so neglected to perform his contract can insist that the landlord shall keep all the terms with him, as if he had fully performed it?"

In Harris *vs.* Rolfe, 2 Price, 210, note, as in the American case of Bacon *vs.* Park, 19 Utah, 246, cited in the opposing brief, the breach was intentional and willful, and throughout a period of years.

In Bacon *vs.* Park, apart from the fact that the complainant really had no interest in the leased premises, which was

sufficient in itself to defeat the right to relief, it was an undisputed fact that he had known for years of his default in payment of the taxes, that it had continued until the amount was nearly $4,000; that the property had been sold for their non-payment, and that the time to redeem had nearly expired; and that, under all these facts, he declared that he did not intend to redeem until the very last day, making it necessary for the landowner to declare the forfeiture in order, himself, to raise the necessary money to redeem the land, or else lose it if, on the last day, the complainant should fail to redeem. In the case at bar, as indicated in the opinion of the Court of Appeals, appellee's payment of the taxes for the succeeding years makes it evident, even if this were denied in the pleadings or the evidence, that the non-payment of the instalment for the second half of the year 1898 was neither willful nor intentional, but was an inadvertent omission, under distracting and distressing circumstances, and largely, if not principally, induced by the conduct of the lessor herself. The motives of the lessors, too, are essentially different in the two cases. In the Utah case the forfeiture was for the necessary purpose of raising the money to pay the taxes and save the title, while, in the present case, it was to be availed of only for the purpose of getting a higher rent, and not then unless or until it was perfectly certain that a new tenant at an increased rent had first been secured.

Baldwin *vs.* Rees, 6 Ohio Dec., 556, printed as Appendix B to the brief of the appellant, was a case in an Ohio superior court, in the year 1880, in which the covenant to pay taxes had been broken, the property sold by tax sale to A, who several years later sold it to the lessor, who had entered, resumed possession of the premises, and had remained in quiet possession thereof ever since, the lessee claiming no mistake, surprise or ignorance. The court, it must be conceded, properly denied relief against the forfeiture, though holding, in doing so, that equity does not relieve "against

a forfeiture effected for such a breach." Upon this point, however, the case is at variance with Eichenlaub *vs.* Neil, which, though reported in 3 Ohio Decisions, at page 365, is later than Baldwin *vs.* Rees, having been decided in 1895, and reviews and overrules that case in no uncertain terms.

The only other case in which relief against forfeiture for breach of a covenant to pay taxes which any of the counsel in this cause have been able to discover is that of Gordon *vs.* Richardson, 185 Mass., 492. The case seems principally relied upon in the opposing briefs on the ground of its reasoning, although that reasoning, it is submitted, is distinctly against the appellants. In it there had been a tax sale for the default, the validity of which was undisputed, and the claim to relief was based upon the fact that it might yet be redeemed. The court said that default in the payment of rent might be relieved against, because the very thing contracted for—*i. e.*, the payment of the rent—might yet be done, but the taxes, having been already paid by the sale, could not be again paid; or, if the real substance and nature of the covenant to pay taxes were looked at, they were to protect and hold harmless the landlord's estate, which could not be done where that estate had been sold and a paramount outstanding title had come into existence. Assuming, for present purposes, this reasoning to be correct, it is in no way in conflict with the opinion below, which holds that the tax has *not* been paid by sale, that the landlord's estate has *not* been sold, that *no* outstanding title, paramount or otherwise, has come into existence; that the matter stands as though the tax certificate and the tax deed had never been issued, and that the situation, therefore, is that there are taxes upon the property in arrears, due and unpaid, for which the lessee is liable, which were not paid through inadvertence or misadventure, and which she now offers to pay (Record, p. 450). The case is, therefore, under the reasoning in Gordon *vs.* Richardson, precisely in the same category as if the default were in the payment of rent—the tenant is still in a position to do

the very thing he contended for, namely, to pay the taxes, and this is precisely what the permits and decree require her to do.

The insurance cases relied upon in the opposing brief to the effect that, after death of the insured, his representatives or beneficiary will not be allowed to recover the amount of the lapsed policy by then making the comparatively small premium payment, so obviously fall short of the case at bar, both in principle and in its equities, that it is deemed unnecessary to discuss them. The principle upon which the decisions in these insurance cases rest is laid down by this court in Insurance Co. *vs.* Statham, 93 U. S., 24, 30, and Klein *vs.* Insurance Co., 104 U. S., 88, 91.

An extract from the opinion of this court in Sheetz *vs.* Selden, 7 Wall., 416, 422, is relied upon at page 33 of the Brief for Webb as committing this court to the doctrine of the English cases against relief in the case of covenants to repair, to insure, and not to assign. Examination of the entire paragraph from which the extract is taken, however, will show that the court is simply summarizing the doctrine of the English courts. The paragraph closes as follows: "Such is now the settled English rule upon the subject. In Bracebridge *vs.* Buckly, Baron Wood, in a dissenting opinion, made an earnest assault upon this doctrine. The question may be regarded as yet unsettled in the jurisprudence of this country," citing 2 Story's Eq. Jur., secs. 1315, 1316, and note.

Section 1316 of Story's Equity Jurisprudence, thus cited, is as follows:

"The true foundation of the relief in equity in all these cases, is, that, as the penalty is designed as a mere security, if the party obtains his money, or his damages, he gets all that he expected, and all that, in justice, he is entitled to. And, notwithstanding the objections which have been sometimes urged against it, this seems a sufficient foundation for the jurisdiction. In reason, in conscience, in natural equity, there is no ground to say, because a man has stipulated for

a penalty in case of his omission to do a particular act (the real object of the parties being the performance of the act), that, if he omits to do the act, he shall suffer an enormous loss, wholly disproportionate to the injury of the other party. If it be said that it is his own folly to have made such a stipulation, it may equally well be said that the folly of one man cannot authorize gross oppression on the other side. And law, as a science, would be unworthy of the name, if it did not to some extent provide the means of preventing the mischiefs of improvidence, rashness, blind confidence, and credulity on one side, and of skill, avarice, cunning, and a gross violation of the principles of morals and conscience on the other. There are many cases in which courts of equity interfere upon mixed grounds of this sort. There is no more intrinsic sanctity in stipulations by contract than in other solemn acts of parties, which are constantly interfered with by courts of equity upon the broad ground of public policy, or the pure principles of natural justice. Where a penalty or forfeiture is designed merely as a security to enforce the principal obligation, it is as much against conscience to allow any party to pervert it to a different and oppressive purpose as it would be to allow him to substitute another for the principal obligation. The whole system of equity jurisprudence proceeds upon the ground that a party having a legal right shall not be permitted to avail himself of it for the purposes of injustice, or fraud, or oppression, or harsh and vindictive injury."

To this may be added the following from Judge Redfield's note, also cited in the opinion in Sheetz *vs.* Selden:

"The only argument of Lord Eldon is, that courts of equity decree what they presume is a compensation, but it, in a given case, may be no just compensation. Now, in the first place, this is no objection to interference, in all cases where a complete and adequate compensation can be given; but only to interference where the facts establish that there cannot be such adequate and complete compensation. And this is the explanation which, theoretically at least, courts of equity adopt. In the next place, it is supposed by Lord Eldon, in Reynolds *vs.* Pitt, 19 Ves., 140, that interest for the delay in the payment of money is not, or will not be, an adequate compensation for the omission to pay at the time

appointed. That objection equally applies to the allowance of money at law as a compensation. It may, in a given case, be inadequate to the particular loss sustained by the creditor. Yet it is uniformly acted upon without hesitation; and the creditor will not be permitted to recover a greater compensation. * * * No system of laws can provide for all the remote consequences of the non-performance of any act. Human justice must stop, as it ought, at the direct and immediate and necessary consequences of acts and omission, and not aim beyond a reasonable indemnification for them."

Applying these principles to the present case, what indemnification will be lacking to the appellant Webb, or to those whom he represents, when the decree from which he appeals, affirmed by this court, is carried out? The tax deed will have been annulled, the taxes paid, the cloud removed, and the estate of the testatrix as to this property completely restored to the same condition, in all respects, as if no default had occurred, nor any tax sale made. It is true that, as suggested in his brief, he may have incurred liability for counsel fees in the cause; but, it is respectfully submitted, the conduct of himself and his lessor in attempting to exploit, for purely mercenary and selfish ends, the opportunity thought to have been offered by the misadventure of the appellee, the careful, self-provident circumspection which withheld decision to forfeit until it was seen "when I am to get another tenant" (Record, p. 95), the harsh charges of untrustworthy faithlessness and the like against the unfortunate appellee as the reasons for refusing to allow her to remain in occupancy of the premises, when, as subsequently admitted, there was no real hostility or distrust, but only a desire to get rid of the long term and seek a higher rent, and the entire subsequent course of action in regard to the matter, amply justified the supreme court of the District of Columbia in allowing the appellant only his taxable costs in the case, and the Court of Appeals in affirming that decree.

Returning to the consideration of the authorities upon the subject of the power of a court of equity to relieve against

forfeiture for breach of a covenant to pay taxes, it will be observed that Rees *vs.* Baldwin, overruled in the later cases of Eichenlaub *vs.* Neil, and Bacon *vs.* Park, both resting upon extreme conscious and willful default as before noted, are the only authorities to be found in the lengthy and exhaustive brief of the appellee. As against these, and in addition to Lundin *vs.* Schoeffel, 167 Mass., 465; Sanborne *vs.* Woodman, 5 Cush., 36, and Giles *vs.* Austin, 62 N. Y., 491-3, are the following authorities:

"Where there has been a breach of a covenant to perform some collateral duty, such as to repair or to insure, which has been caused by accident or mistake, equity will relieve if the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred." McTier *vs.* Osborn, 146 Mass., 499, in which case the breach was of a covenant to keep the premises insured in favor of the lessors.

In Garner *vs.* Hannah, 6 Duer, 273-4, the court held it to be "perfectly clear that, although the landlord might forfeit and obtain judgment for possession for breach of the covenant, the tenant will be entitled, notwithstanding that judgment, to relief upon the principles of equity, against the forfeiture. It is the province of a court of equity to interfere to give relief against the forfeiture for the breach of other covenants, as well as for the payment of rent"—the breach being the same as in the present case, namely, that of a covenant to pay the taxes upon the demised premises.

"Courts of equity treat provisions for the forfeiture of leases for the non-payment of rent, as security, merely, for the payment of the rent, and, at an early date, assumed jurisdiction to relieve tenants from such forfeiture upon the payment of all rents in arrear and the costs of the proceeding, if any, instituted by the landlord for the recovery of the possession. And this rule has been extended to cases of forfeiture for non-payment of taxes" (18 Am. & Eng. Encl. L., 389).

In Hand *vs.* Swaritz, 148 Pa. St., 207, cited by the other side, the court puts a covenant to pay water rates upon precisely the same footing as a covenant to pay rent, and cites Fernwood Masonic Hall Association *vs.* Jones, 102 Pa. St., 307, to the effect that a covenant to pay gas bills stands in like manner upon the same footing.

In Tibbetts *vs.* Cate, 66 N. H., 550, which the opposing brief supposes to have gone "upon the ground that the lessee was ignorant of business and that her failure to pay the taxes as covenanted was not willful," the court says: "The condition of the will relating to the payment of taxes, for the nonperformance of which a forfeiture is claimed, was intended to secure the payment of money, and the damages for the default can be readily ascertained. The case is a proper one for equitable relief, unless the complainant has lost the right to claim it by her inequitable conduct"—and her ignorance of business was simply referred to as explaining her default in payment of the taxes, as showing that it was not willful or inequitable conduct.

See, also, for additional cases in which relief was granted against attempted forfeitures for forgetful or negligent omission to pay taxes (Noyes *vs.* Anderson, 124 N. Y., 175; McClartey *vs.* Gokey, 31 Iowa, 506), to make repairs within the time limited (Bargent *vs.* Thompson, 4 Giff., 473), to improve by the erection of a building (Hagan *vs.* Beck, 44 Vt., 286), to maintain a gas supply pipe (South Bend Oil Co. *vs.* Edgell, 86 Am. St. Rep., 43), omission to pay an incumbrance assumed (Hancock *vs.* Carleton, 6 Gray, 39; Kopper *vs.* Dyer, 59 Vt., 477; Steel *vs.* Branch, 40 Cal., 3, 11-12), covenants not to assign until improvements are completed (Grigg *vs.* Landis, 21 N. J. Eq., 494, 510-2).

That the weight of authority is, therefore, overwhelmingly in favor of the decree below is abundantly apparent; and that these authorities best comport in reason with the principles upon which the entire doctrine of the equity jurisdiction to relieve against forfeitures is founded, in cases in which the

status quo can be fully restored, it is submitted is equally obvious.

"The test which determines whether equity will or will not interfere in such cases is the fact whether compensation can or cannot be adequately made for a breach of the obligation which is thus secured. If the default is to secure some payment of money, compensation can always be made, and a court of equity will relieve the debtor party upon his paying the principal and interest. If it be to secure the performance of some collateral act [*e. g.*, the payment taxes], a compensation for non-performance can be made, and a court of equity will ascertain the amount of damages, and relieve upon their payment" (1 Pomeroy Eq. Jur., sec. 433).

"The general doctrine was finally settled that, wherever a penalty or forfeiture is inserted merely to secure the payment of money, or the performance of some act, or the enjoyment of some right or benefit, equity regards such payment, performance or enjoyment as the real and principal intent of the instrument, and the penalty or forfeiture as merely an accessory, and will, therefore, relieve the debtor party from such penalty or forfeiture whenever the actual damage sustained by the creditor can be adequately compensated" (*Id.*, sec. 381).

Of Peachy *vs.* Duke of Somerset, referred to in the opposing brief as a leading case, White and Tudor, vol. II, pt. 2, p. 2015, referring to the opinion of Lord MacChesford, says, at page 2023: "He, however, seems to confine the cases in which equity interferes to those where the penalty is designed to secure the payment of a sum of money. The principal case of Sloman *vs.* Walter [breach of a covenant to allow use of a room] shows that the jurisdiction of equity is not of so limited a nature, but is extended to cases where the penalty is inserted not merely to secure the payment of money, but the *performance of some collateral act.*"

The attempt, at page 36 of the brief, to distinguish Giles *vs.* Austin, 62 N. Y., 486, on the ground that in that case the tax deed had not become irredeemable and no rights of third

persons had attached, is untenable, the decree appealed from being, in like manner, based upon the finding of the court that the tax sale is utterly void, so that the tax title is not merely redeemable, but non-existent, and, consequently, never gave any rights to third persons. And, indeed, that there should be no forfeiture unless the tax sale is irredeemable seems to be conceded in the learned brief on behalf of Webb, at pages 166-7.

To sum up the authorities upon the question of the jurisdiction to relieve against forfeiture for breach of a covenant to pay taxes, those denying it are three in number only, namely, Bacon *vs.* Park, 19 Utah, 246; Baldwin *vs.* Rees, 6 Ohio Dec., 556, and Gordon *vs.* Richardson, 185 Mass., 492, the first two being cases of willful default, and it not appearing in the last of them whether the default was or was not the result of inadvertence, misadventure or willfulness. Of them, Baldwin *vs.* Rees is expressly overruled in Eichenlaub *vs.* Neil, 3 Ohio Dec., 365, while Gordon *vs.* Richardson is based upon the fact only that, the tax sale in that case being valid, and the tax already paid, it was impossible for the lessee to perform, so that the very thing the lessee contracted to do can no longer be done, as in the case of rent (see the quotations at pp. 60-1 of the Brief for Kanns), and as in the case at bar.

On the other hand, sustaining the jurisdiction, besides Eichenlaub *vs.* Neil, *supra,* and Gordon *vs.* Richardson, where the tax may still be paid, are Garner *vs.* Hannah, 6 Duer, 262; Giles *vs.* Austin, 62 N. Y., 493; McClartey *vs.* Gokey, 31 Iowa, 505; Noyes *vs.* Anderson, 124 N. Y., 175; Tibbetts *vs.* Cate, 66 N . H., 550; Ins. Co. *vs.* Biggs, 8 Baxt., 563; Muller *vs.* Earle, 3 Jones, &c., 461, 473; 69 L. R. A., 833, 844, 848. Analogous to these, and repudiating the doctrine that breach of collateral covenants to repair, insure, or the like, cannot be relieved against, are Mactier *vs.* Osborn, 146 Mass., 399, to insure; Lundin *vs.* Schoeffel, 167 Mass., 465, to repair; Hand *vs.* Swaritz, 148 Pa. St., 207, to pay

water rents; Fernwood Association *vs.* Jones, 102 Pa. St., 207, to pay gas bills; Sanborn *vs.* Woodman, 5 Cush., 541, to pay interest on a mortgage, etc., there being no American authorities, it is believed, opposed to these.

With regard to the word "accident," the meaning of which is made the subject of considerable discussion in the opposing brief, it is to be said that the word is used in various senses by different courts, and in different cases. Sometimes its meaning is restricted to pure "accident," without the intervention of any human agency, as in the case of damage by lightning, etc., in others, where human agency is included, provided it involve no act of the party himself; in other cases, that can be an accident which happens partly by one's own agency, if free from negligence on his part, and, in still others, some degree of inadvertence or carelessness upon his part is admitted.

Webster defines it as "An event which takes place without one's foresight, or expectation;" Worcester, as "An event proceeding from an unknown cause, or happening without design of the agent;" the Century Dictionary as "In general anything which happens or comes to be without design—a happening without intentional cause." Roget's Thesaurus associates it with "absence of intention," while in Crabbe's English Synonyms, "That is an *accident* which is done without intention, that is a *chance* which can not be brought about by use of means." In some of the authorities it is held, in the view of the equity courts, to be an event occurring without negligence on the part of the complainant, usually, however, meaning in this connection willful or continuous negligence. All these distinctions are, however, largely academic, even the authorities referred to not precluding relief because of inadvertence or non-willful negligence, but referring the relief in such cases to the equally available head of equity jurisdiction, Mistake.

The extract from section 146 of Story's Eq. Jurisprudence, contained at page 114, in regard to mistake will, of course,

be read in connection with its context. At section 110, when formally defining the term, that author states:

"It is sometimes the result of accident in its large sense, but, as distinguished from it, it is some unintentional act or omission or error, arising from ignorance, surprise, imposition or misplaced confidence."

And note 1 to the section adds:

"Mr. Jeremy defines mistake, in the sense of a court of equity, to be, 'that result of ignorance of law or of fact which has misled a person to commit that which, if he had not been in error, he would not have done' (Jeremy's Eq. Juris., B. 3, pt. 2, p. 358). This distinction seems too narrow, and it does not comprehend cases of omission or neglect."

To the question, discussed at length in the opposing brief, whether compensation can be made to the landlord, it is conceived unnecessary in behalf of the appellee to devote much time or space. Equity deals with each case of this character upon its own circumstances and intrinsic merits, and, as said by Judge Redfield in the note to 2 Story's Eq. Jur., sec. 1516, in answer to the objection that there may be a given case in which what courts presume is compensation might not be just compensation in fact, "This is no objection to any interference, in all cases where a complete and adequate compensation can be given; but only to an interference, where the facts establish that there cannot be such complete and adequate compensation. And this is the very exception, which, theoretically at least, courts of equity adopt."

The brief of appellant Webb, notwithstanding the limitless industry and the ingenuity and skill which it exhibits, points out no particular in which performance of the decree below will leave appellant in a different situation from that in which he would have been had the default in the tax payment never occurred, with the single exception of his liability to counsel fees, incurred, not in the defense of his title, but in the effort, by appealing from court to court, as

in the first instance and in every other conceivable way, to deny the appellee her equitable right to redeem, upon terms of full compensation, and this, admittedly, without any real loss of confidence in the tenant or for any one of the reasons assigned in the correspondence set forth in the record, but in order to deny the appellee the benefit of the rental rate fixed by the lease, and to get the higher rental offered by the Kanns, whether from them or from the appellee. As stated above, neither of the lower courts considered the appellant Webb entitled to solicitor's costs or counsel fees as against the appellee, under such circumstances, and we submit that the facts of the case present no occasion for interference with the judgment and discretion of those courts upon such a question.

It only remains to consider, in this connection, four cases, one in this court, and three from England, which appear to be strongly relied upon on behalf of appellant Webb, namely: Grymes *vs.* Saunders, 93 U. S., 55; Duke of Beaufort *vs.* Neeld, 12 Cl. and F., 248; Barrows *vs.* Isaacs, 1 Q. B. D., 1891, 417, and Eastern Tel. Co. *vs.* Dent, 1 Q. B. D., 1899, 835.

The first and second of these cases relate neither to the subject of leases nor to that of forfeiture, but to what is designated in the text books and authorities as unilateral mistake in cases of contract. They hold simply with the authorities generally that in such cases the party who has in terms contracted with another to do a particular thing in plain and unambiguous language, upon the faith of which undertaking upon his part the other party has entered into obligations and acquired rights in good faith and without notice, may not rescind his contract to the loss and injury of such other party on the ground that he, himself, through his own fault, was mistaken in respect to some features of the agreement. The rule rests upon considerations of public policy and necessity, the right to relief upon such grounds, if recognized, being destructive of the possibility of business

transactions between men. In this class of cases, the fact of mistake may be undisputed, but, unless under the exceptional circumstances instanced in Grymes *vs.* Saunders, the rule that he whose negligence occasioned the inconvenience or loss must bear it prevails. Such cases, resting upon such considerations, are manifestly without relevance to cases of forfeiture, where the mistake, accident, surprise and the like are confessedly, generally, if not always, upon the party seeking the relief, and where the very principle of the jurisdiction is that the enforcement of the forfeiture is inequitable and an oppression upon the complainant, which may be relieved against without injustice, hardship or loss to the adverse party.

The other cases, Barrows *vs.* Isaacs and Eastern Tel. Co. *vs.* Dent, though arising under leases and relating to forfeitures, belong in their facts to the same class of cases as those just mentioned, and turn upon the same principles. They were cases of extreme hardship, nor were the courts which decided them insensible of that circumstance; but, read in connection with their facts, it is difficult, and perhaps impossible, to dissent from the reasoning and the decision of the courts as applied to them.

In the first of them, Barrows *vs.* Isaacs, a tenant, bound not to sub-let without the consent of his lessor, did sub-let to responsible sub-tenants, through forgetfulness of his solicitor as to the terms of the lease, or through negligence in not consulting it. The breach did not result in a mere debt or condition, which could be discharged or removed by the payment of a definite, liquidated or ascertainable sum of money, as in the case of non-payment of rent, taxes and the like, nor could the *status quo* be in any manner restored. The sub-lessees were in possession, and, if the forfeiture were waived or relieved against, must have remained so. The contention was that they were parties unobjectionable in every respect, to whom the lessor could not have had any valid objection if the mistake had not occurred and if he had

been applied to in time, the lease providing that he should not arbitrarily withhold consent in the case of respectable or responsible applicants; but the court based its decision upon the fact that the lessor might withhold without arbitrariness, even in the case of respectable and responsible persons, since even such persons might desire to carry on a trade which would be injurious to him, or tend to depreciate his property, or he might object to any underlease of a part, only, of the property, as was the character of the sub-lease in question, and that many other reasons for objecting might be suggested.

That forgetfulness of the terms of the lease, or failure to consult it before underletting, may well be held not to be accident, mistake or surprise sufficient for relief under such circumstances, leaving the premises to remain sub-let without the consent of the lessor, may be conceded, great as the hardship may have been.

The mistake or negligence in this case, it will further be noted, was, not that of the lessee himself, but of his agent, which fact, where the breach was that of a covenant to pay taxes, is held in Noyes *vs.* Anderson, 124 N. Y., 175, to be a ground for relief, as showing that the breach was not willful; though necessarily incapable of altering the rule under the facts of the Barrows case, now under consideration, since to have held otherwise would have been to impose upon the lessor the consequences of the negligence of the lessee's agent.

Eastern Tel. Co. *vs.* Dent, 1 Q. B. D., 99, was, also, the case of an underlease by a lessee without the lessor's consent, the lease containing a provision for forfeiture in such event, though stipulating that the lessor should not withhold consent unreasonably. The lessor had previously consented to the sub-letting of a part of the demised premises to the sub-lessees, from which it was argued that the omission to ask consent was reasonably to be regarded as unimportant, and that the plaintiff lessor could not reasonably have with-

held his consent; but the court, by Smith, L. J., holding the case governed by Barrows *vs.* Isaacs, declares: "I could not bring myself to say that a judge could run his pen through that part of the contract, which is that consent should be asked for, and render it of no effect," to which Romer, L. J., adds: "It cannot be said that the lessors unreasonably withheld consent to a sub-letting, because no consent was asked for." The case is apparently considered by the court to be in conflict with Hyde *vs.* Warren, 3 Exch. Rep., 72, 81-2, though, in that case, the lessor was bound to accept any respectable and responsible person, and therefore would seem to be clearly distinguished from Barrows *vs.* Isaacs, where the agreement was not to refuse arbitrarily, and from Eastern Tel. Co. *vs.* Dent, in which the stipulation was not to withhold consent unreasonably.

Taking these cases and their reasoning together, it is submitted, in the first place, that they do not deny the jurisdiction of the court in cases like the present, and, in the second, that they cannot be so construed without rendering them hopelessly antagonistic to the overwhelming weight of authority upon the subject of relief against forfeitures, both English and American.

In the first place, both the cases in question presented applications to the court, not to grant relief against forfeiture for breaches the consequences of which could be fully and entirely removed and the parties completely restored to their former status, but, to use the language of the court in the latter one, to run a pen through the covenant broken and render it of no effect—*i. e.*, to deprive one of the parties wholly of its benefit because of the forgetfulness or mistake of the other. The cases, therefore, are identical in principle with suits, not for relief against forfeiture at all, but on the ground of unilateral mistake, of which Duke of Beaufort *vs.* Neeld and Grymes *vs.* Saunders, *supra*, are types; the only difference being that, in the last-mentioned cases, the mistake occurred in the original entering

into or making of the contracts, while in Barrows *vs* Isaacs and Eastern Tel. Co. *vs.* Dent they occurred in the performance of them. The relief, if granted, would have been the same, in effect, in each of the cases, namely, to deprive one of the parties of the contract he had made, and upon which, unaltered, he had the right to stand, because of the negligence or mistake of the other party to that contract; and not, as in cases like the present, to restore both parties to precisely the same position which they had severally agreed to occupy, and which they would have continued to occupy under the very terms of their contract but for a wholly innocent, unintended inadvertence or oversight in respect of them.

The principle underlying Grymes *vs.* Saunders and the other cases of that class, is thus stated in that case, 93 U. S., at page 62: "A court of equity is always reluctant to rescind, unless the parties can be put back *in statu quo. If this cannot be done,* it will give such relief only where the clearest and strongest equity imperatively demands it."

But in the second place, if Barrows *vs.* Isaacs and Eastern Tel. Co. *vs.* Dent are to be construed as holding that equity cannot, or will not, relieve against forfeitures which would not have occurred but for some forgetfulness, oversight or negligence upon the part of the party in default, then they are irreconcilably in conflict with the entire history and existence of this branch of equity jurisprudence. If correct, then not only did the court err in relieving against forfeiture for forgetful or negligent omission to keep the interest on a mortgage paid up (Sanborn *vs.* Woodman, 5 Cush., 316), or to pay taxes (Giles *vs.* Austin, 6 J. & S., 325, 62 N. Y., 235; Garner *vs.* Hannah, 6 Duer, 273-4; Eichenlaub *vs.* Neil, 3 Ohio Dec., 365; Noyes *vs.* Anderson, 124 N. Y., 175), to make repairs within the time limited (Bargent *vs.* Thompson, 4 Giff., 473), to improve by the erection of a building (Hagar *vs.* Beck, 44 Vt., 286), to maintain a gas-supply pipe (South Bend Oil Co. *vs.* Edgell, 86 Am. St.

Rep., 43), and the many other cases of relief against forfeiture for breach of collateral covenants, but the whole doctrine of such relief, even for breach through non-payment of rent, must also be overturned, wherever such default is not occasioned by *vis major* or other equivalent cause, unconnected with forgetfulness, negligence or other human fallibility or infirmity upon the part of the tenant—these cases falling no more under the definitions of accident or mistake than the non-payment of taxes, or the non-performance of any other stipulated duty, under similar circumstances.

2.

But, in the second place, and perhaps principally in the present case, even if the rule as to the power of courts of equity to relieve against forfeiture for breach of a covenant to pay taxes were, ordinarily, as is contended by the appellant, would that rule be applicable to a case like the present?

Suppose that, in the case of such a covenant, the lessor should take the payment of the taxes into his own hands, paying them himself, or through his own agents, and simply calling upon the lessee from time to time to reimburse their amount, and that, after such a course of dealing by him with regard to the matter, extending through a number of years, he should, through inadvertence or otherwise, omit to pay an instalment, could it be contended that, the rental value of the property having increased in the meantime, he could take advantage of the default, terminate the lease, and either require that the lessee should take a new term, at a higher rate, or else lease to a new tenant, for the sake of the increased rental? These are, it is submitted, precisely the conditions presented by the present case, unless the appellant's contentions in respect to either the legal necessity, or the actual fact, of a changed condition in respect to paying the taxes after the death of the original lessor and the subsequent assignment to the appellee, can be sustained under the facts and circumstances established by the record. Indeed,

at p. 68 of the appellant's brief, it seems to be conceded that the lessor would be estopped under such circumstances, unless the estoppel is obviated by showing that the appellee bought without knowledge of this course of conduct on the part of the lessor, or received notice that the lessor intended to charge it.

The lease having been made to take effect October 1, 1890 (Record, p. 13), we find the lessor's letter of May 26, 1891, calling upon the lessee to send the tax money falling due at that date to her, so that she might, herself, make payment of it; and, though her similar leters are not inserted chronologically in the record, they and the checks of the lessee to Mrs. Kennedy's order are brought down to May 29, 1897, the date of the tax instalment immediately preceding the death of the lessee and the assignment of the lease to Mrs. King (Record, p. 279). It, therefore, only remains to consider what foundation there is for the claims on behalf of the appellant Webb that the conditions changed with the assignment, which claims appear to be three, namely:

1. That the assignment constituted a new starting point, under which it was incumbent upon the lessee to ascertain exactly what her obligations were, and, inferentially, to establish a new course of dealing with respect to the taxes (Brief for Webb, p. 106).

2. That the lessee must be shown to have bought with notice of the lessor's manner of dealing with the tax payments, in order to claim consideration in consequence of it (Brief for Webb, p. 68).

3. That the requirement of the lease that the taxes should be paid by the lessee could be, and was, revived against her by notice (Brief for Webb, p. 73).

1–2. The first and second of these propositions would appear to be purely hypothetical, with nothing in the record upon which to rest them. The lease and the lessor remained

unchanged, while Harry King, who had for years been manager of the business conducted upon the premises by the deceased lessee, continued in that capacity for the assignee. Upon what theory, under such circumstances, and especially where the inquiry arises merely in aid of an attempted forfeiture, can a court of equity be asked to impose upon the asignee the duty or inquiring of the lessor whether her uniform course of conduct for the past six or more years, under the same identical lease, would be changed?

3. The claim that, having estopped herself to hold the assignee to the duty of seeing to the payment of the taxes in the first instance, by her course of conduct, the duty of the tenant to do so was revived by notice, presents, of course, a question of fact, to be determined by the evidence; and the burden of proof in respect to it, necessarily, is upon the lessor. In addition, it is one upon which this court will not interfere with the findings of the courts below, unless there is error clearly shown (Shappirio *vs.* Goldberg, 192 U. S., 232, 240, and cases cited *supra.*

The only testimony upon the subject is that of Joseph King, who testified on direct examination, at p. 154 of the record, that, shortly before Christmas, 1897, Mrs. Kennedy told him she had neglected to notify the Kings in reference to the taxes; that she asked whether they would not have them paid, and that he had replied, saying he would go up and tell his brother; that he would notify him at once; that she needn't worry, it would be attended to; after which follow the two questions and answers quoted at p. 74 of the brief of the appellant Webb, and referred to at p. 58 of the Brief for the Kanns:

"Q. Did you notify your brother? A. Yes, sir. I went that night and told my brother, Mr. Harry King.

"Q. That was the only occasion that you recall that she discussed taxes with you? A. Yes, sir."

If this were the only testimony upon the subject, we submit that it would be stretching it very far beyond its reason-

able tendency and scope to hold, upon the strength of it, as is claimed more than once in the opposing briefs, that Harry King was "pointedly" given notice that he was expected by Mrs. Kennedy to pay all the taxes accruing subsequently to the date of this conversation, and that the lessor would thenceforward discontinue her uniform practice in that regard with respect to all further instalments of the taxes. New York Indians *vs.* U. S., 170 U. S., pp. 25-6. And see as to inconclusive testimony, even in an ordinary suit on contract, Oullahan *vs.* Baldwin, 100 Cal., 635.

The testimony of this same witness, Joseph King, on cross-examination, on the succeeding page of the record, however (p. 155), completely removes all ambiguity or possibility of misconception or discussion:

"Q. What taxes did she speak of? A. She spoke of taxes of 1897, sir.

"Q. Due in November, 1897, the preceding November. A. Yes, sir.

"Q. What did she say about them? A. She said she had neglected in notifying us.

"Q. Neglected to notify you about what? A. About the taxes.

"Q. That they were due or unpaid or what? A. That they were due.

"Q. She had neglected to notify you that those taxes for November, 1897, were due? A. Yes, sir.

"Q. What next did she say? A. And would we please see that they were paid.

"Q. What? A. See that they were paid.

"Q. I do not understand you. Do you mean she asked you if you would see if they were paid? A. She said 'Would you please see that they were paid,' and I said that I would attend to it.

"Q. Is that all? A. That is all, sir."

At pages 74-6 of the brief is set forth an extract from the cross-examination of Harry King (pp. 187-8 of the Record), the substance of which, upon this point, was that, although he knew the taxes were payable twice a year, he did not do

anything in the May following this conversation between Mrs. Kennedy and his brother, because he "had not charged his mind with it at all," and that the following November he did not do anything about the taxes, "for the same reason I stated before." One reading the quoted extract, only, would necessarily understand the witness as saying that he did not pay the taxes on either occasion, because he had not charged his mind with it at all. The reason "stated before," however, to which his testimony, taken as a whole, would readily show him to refer, was given on his direct examination, on page 170 of the Record:

"Q. What explanation is there for the fact that you paid no taxes between September, 1897 and July 1900? A. Mrs. Kennedy always paid the taxes. * * * Mrs. Kennedy had always paid the taxes herself. She would always notify us when the taxes were due, and what amount to send her, and we relied upon her. I did not charge my mind with the matter. My father's sad death in the fall of that year left both my mother and myself very much mentally distressed, and the condition in which the large estate which we supposed our father had was left caused us a lot of anxiety and worry. The creditors were clamoring at all times for their money, and we were beset on all sides by people who wanted their money that was due them. Endorsements for large amounts were cropping out, and the local banks here were after me every day. My mind was thoroughly unsettled. With the management of the business and because of finding the business in such a condition, I had my hands full and all I could possible attend to.

"Q. What was the condition of your mother's mind and health during this period? A. My mother's health was very bad, and continued bad. From a woman weighing 190 pounds, she had gone down to about 145 or 150."

And then, after a letter from the lessor to the appellee in January, 1898, immediately following her interview with Joseph King about payment of the November taxes, the witness explains how, in the year 1900, when engaged with his co-receiver in paying arrears of taxes which had accumu-

lated on his father's large real estate holdings, it occurred to him to request his book-keeper to inquire about the taxes on the property in dispute, and the payment by him of all taxes which were then reported to be in arrears (Record, p. 170 *et seq*).

The foregoing is the entire testimony upon the subject of the alleged notice, "pointedly" or otherwise, given to the appellee, or to her son for her, that Mrs. Kennedy intended to discontinue the method of dealing with the taxes which had theretofore prevailed between them. We submit that it fails to present fair color, even, of either such an intention or of such notice; and, if not, then clearly the omitted payment is primarily due to the inadvertence, forgetfulness or oversight of the lessor herself, and, as the Brief for Webb appears to concede, should justly estop her from setting up a forfeiture by reason of that oversight. If this be correct, as we submit it is, it follows that the entire discussion of the legal question to which so much space has been devoted, in both briefs, is superfluous in so far as this case is concerned.

VI.

The remaining assignment of error is that the court erred in refusing to deny relief on the ground that the appellee has charged, and has failed to prove, actual fraud.

This question is presented in the brief, and, in view of the state of the record, is somewhat mystifying. The only allegations of the bill which can be referred to as tending, even, to present a charge of fraud, actual or otherwise, are those which aver that, as complainant is advised and believes, neither Mrs. Kennedy or the Kanns contemplated use of the tax certificate to endanger the title of the former, but that there existed an agreement or understanding, either express or tacit, that the tax title should be used in furtherance of a common design to dispossess the appellee, and to admit the Kanns as tenants, at an increased rental. That this was certainly true as to appellant Webb, down to October 9th, is

abundantly manifest throughout the record. When asked by Mr. Tobriner whether possession had been demanded or ejectment instituted under the tax title, he laughed at the idea and declared, "There is no danger of that." Down to October 9th he claimed to be at full liberty to continue the Kings in occupancy, if Mrs. Kennedy's interests rendered it desirable to do so (Record, pp. 317, 370). He testifies that, when Mr. Cohen had disclosed his purpose to purchase the tax title, he, Webb, did not consider that it would be any more dangerous in his hands than in those of Wiltsie; that he understood from Mr. Cohen (Record, p. 330) that he was going to buy the tax title "on speculation," and possibly expecting the Kings to take it up.

That the allegations of the bill in the paragraph now under consideration differ widely, if at all, from the facts, seems hardly capable of being seriously urged. Curiously enough, this charge of actual fraud now urged as a last means of defeating the bill, the success of which would seem to be to the interests which the appellant represents, rests mainly, not upon the bill, nor upon anything which the appellee has made a part of the record, but upon a letter written by her counsel to the appellant in an effort to bring about an adjustment without litigation, which letter, quoted at pages 151-2 of the Brief, is in the record only because the appellant, himself, has placed it there as an exhibit to his answer (Record, pp. 89-91).

Still more curiously, apart from the circumstance that no one of the four propositions of fact set out in that letter are seriously contested in the case in material particulars, at least in so far as the action of Mr. Webb or of Mrs. Kennedy is concerned, the Brief on his behalf, although arguing that these allegations, and the inference which it is claimed should be drawn from them, constitute charges against Mr. Webb of so gross a character that they should, of themselves, be a ground for denying the relief which otherwise the complainant might be entitled to, proceeds to demonstrate that

those allegations, even as it is contended they should be construed, not only do not charge him with anything that is wrong, but present the very course of conduct which he would have been advised to pursue, had he consulted his counsel (Brief for Webb, pp. 169-71).

To argue after such a concession that the averments, not only of the bill, but of the letter which he himself has placed in the record, and even when most adversely construed, charge only what it was entirely right and proper for the appellant to do, and what his counsel would have advised him to do, cannot constitute charges of fraud for which the bill should be dismissed, would seem to be a waste of time.

While the foregoing, it is believed, covers the questions of law and of fact raised upon the record and presented by the assignments of error, quite a number of attacks and charges are presented in the opposing Brief for Webb to which, perhaps, some brief reply should be made.

I.

FRAUD UPON THE LESSOR.

At pages 91-5 it is urged that the present life of the lease depends upon the extension of 1896, and that this extension was an "unfair bargain with an old woman," made by an "experienced business man," namely, the appellee's husband.

It will be recalled that, in the answer of the appellant, it was charged that Mrs. Kennedy paid taxes upon the entire demised premises, in forgetfulness of the duty of the lessee under the terms of the lease and under the erroneous impression that she was obliged to pay them and that this was due, in part, to the circumstance that she had no copy of the lease, and in part to her advanced age. On the *interlocutory* appeal to the Court of Appeals from the order of the lower court, granting an injunction *pendente lite*, the Brief on behalf of the appellant Webb commented as follows:

"Can it be doubted that the lessee, Harry King, Jr., well knew these facts and took advantage of them?" When the case was before the Court of Appeals on final hearing, the testimony then demonstrating that the charge in this regard was wholly without foundation, the appellant's brief made honorable amends as follows: "Of the original lessee, H. King, Jr., the defendant Webb can only speak favorably. It is a matter of regret to him and to his counsel that, under the misinformation that King had not paid the taxes under his covenant, such assumed action upon his part was unfavorably commented upon." Upon the present appeal, in this court, the deceased lessee is represented as an experienced business man who made an unfair bargain with an old woman, by obtaining from her the extension of October 8, 1896.

It must be noted, in the first place, that this charge is wholly foreign to any issue raised by the pleadings, or even in the evidence. The point is one first raised in an appellate court.

Independently of this point, it remains to be seen upon what foundations the charge rests. These are two, namely, the alleged extreme age of Mrs. Kennedy at the time of the extension in question, and the alleged inadequacy of the rental at that time. The first of these propositions is arrived at by "assuming" Mrs. Kennedy's age to have been 80 years at the time of her death, which would have made her 69 years old at the time of the original lease, and about 75 years old on the date of the extension in question. If, on the other hand, her age is assumed to have been 70 years at the time of her death, which assumption is quite as allowable as the first, then she was 59 years of age at the date of the original lease, and about 65 years old at the time of the extension. Surely, if the appellant had any such point as this in mind while the case was in progress, and it was allowable to rely upon it without an amendment of the pleadings, the age of Mrs. Kennedy should have been proven. If an afterthought, it is not to be determined in this court by assumption.

The claim that the rental was inadequate, or the bargain an unfair one at the time it was made, is supported by an equally ingenious but inadmissible assumption, namely, that at its date, in 1896, the property was worth the rental which the Kanns offered for it in 1901. Up to June, 1901, when Louis Kann "casually" offered the appellant $300 per month for the premises, they had made no offer for it, and in so far as the record discloses had not desired to rent it. There is no evidence that today the fair market rental value of the property is in excess of the $200 per month provided by the lease, apart from its special value to the Kanns for the purpose of ousting a rival merchant and of making their business premises continuous. Not a scintilla of evidence, or attempt at it, is made in the record to show that the extension, when made, was not perfectly fair to both parties, or in any respect disadvantageous to the lessee, nor that if, through business reverses or otherwise, the Kanns should no longer be in competition for the premises, a better rental could be obtained for them than that provided in the lease. The imputation of obtaining an unfair bargain from an old woman, against a man now deceased and against whom a year ago the appellant could "only speak favorably," would seem not to be justified by the record.

That reference to the briefs at former hearings of the case is allowable, even as a basis for imputing grave charges upon wholly unproved and erroneous assumptions, appears from pages 108-9 of the Brief for Webb.

So far from the property being worth $83,000, as per the ingenious computation at pages 93-4 of the Brief, Mr. Webb in his answer, replying under oath to the allegation of the bill that the property was worth not less than fifty thousand ($50,000) dollars, avers (Record, p. 84), "This defendant is unable to state whether the amount of said estate will largely exceed in value the amount of said legacies," which legacies were about $40,000, and upon which sum the rent reserved by the lease would be 6 per centum per annum, exclusive of taxes.

The appellant Webb secured the probate of, and is here claiming under, a will of the lessor nearly contemporaneous with the last extension of the lease, and a codicil nearly or quite two years later. He advised and conferred with her, according to his own testimony, as to whether she should insist upon or waive the forfeiture, and left the decision of that question to her own judgment; acted under her instructions, written in his absence, and otherwise dealt with her, down to the time of her death, in 1901, as a competent and capable person for business purposes (Record, pp. 78, 79, 81, 83, 27, 308, 320-1, etc.). He made the charge in his answer that appellee's husband had paid no taxes, but had left them to be paid by the lessee in forgetfulness by her of his obligation and through the fact that she had no copy of the lease, because he considered her recollection to that effect, in 1901, more reliable than that of the clerk of the real estate agent's through whom they were paid, and who acquainted him with the true facts of the case before the charge was made. These facts would seem to be a sufficient answer, if any were needed, to the present charge that she was incompetent properly to protect her interests in 1896, and was then made the victim of an unfair bargain by an experienced business man, upon no other ground than the fact that, five years later, the Kanns were willing to pay a higher rent to get the Kings out of competition with them, in a building separating their then stores. That they did not want the premises in 1896 would appear from the fact that they made no offer for them in 1897, when the death of Henry King, Jr., and the financial condition of his affairs made the lease a legitimate subject of offers to purchase.

Finally upon this point, the appellee having invested her insurance money and borrowed funds for the purchase of this lease in 1897, upon the faith of the lessor's written consent to its assignment to her, it is difficult to see how she could be affected by equities between the lessor and the original lessee, even if any existed, in respect to the fairness of the extension made in 1896.

II.

GOOD FAITH OF APPELLEE'S OFFER OF INDEMNITY.

The appellee having offered on October 8, and again on October 12, 1901 (Record, pp. 21-2), to annul the tax deed by legal proceedings at her own cost, and to indemnify Mrs. Kennedy by proper bond against any liability or loss in the premises, both of which propositions were declined in the manner shown at pages 21-3 of the record, the opposing brief argues that these offers were not made in good faith, because the appellee declined the proposition of October 30, submitted by Mr. Webb (Record, pp. 87-9), this proposition involving, among other things, a bond to pay $70,000 for the property in case of defeat, although, as shown above, Mr. Webb's answer swears that he cannot state that its actual value was in excess of $40,000. That the appellee's propositions were made in good fath is evidenced by the fact that she promptly gave in this cause, as required, bond with approved surety to indemnify the parties in interest against any liability to loss on account of the tax sale, in the amount fixed by the court pursuant to said allegation of the answer. The Webb proposition of compromise, however, would seem effectively to negative the argumentative suggestion of his brief in this court (p. 180), that, in proposing again to accept the faithless appellee as tenant, he did not indicate any willingness to remit to her diligence the payment of taxes on the property.

III.

ALLEGATION THAT APPELLEE IS NOMINAL PARTY ONLY.

In both the opposing briefs it is claimed that Harry King, not the appellee, is the real party in interest, the Brief for the Kanns below further declaring that the appellee's sons are

masquerading before the court "in the guise of a bereaved widow."

That the appellee purchased, paid for and conducted the business, partly with insurance money and partly with money borrowed from relatives for the purpose is shown by the record, and is nowhere contradicted. The allegations in question have no other support than the fact that Harry King, who had managed the business during his father's lifetime, continued to manage it for his mother, and that, in the spring of 1898, some eight or nine months after the purchase, the appellee gave two of her sons an interest in the profits of the business as compensation for their services in conducting it, no interest in the lease being assigned to or acquired by them.

IV.

ATTACKS ON HENRY KING.

Although there is not only no issue in the case which depends upon the testimony of Harry King, but no fact testified to by him which is at all in controversy, his integrity and good faith are attacked in sundry paragraphs, the purpose or reason for which attacks is not obvious.

The charge against him of fraud in selling the business of his deceased father to his mother, in his capacity of administrator, rests upon no other foundation than that a bill charging fraud was brought by certain creditors, answered by a full and complete denial in every particular, followed by an entire failure to produce any evidence by the cerditors to establish their charges, and, finally, by a hearing upon bill and answer, resulting in a decree for sale of the conceded assets of the father, which did not include the lease in controversy.

The attempt to fasten upon him the responsibility for an inaccuracy in his petition as administrator for sale of the lease was persisted in below, and is repeated here, notwith-

standing the fact that the testimony of the attorney who prepared the petition, at page 251 of the Record, is that it was drawn by him with the lease before him, and that, "If there was any mistake in setting out the term of that lease, it was my mistake;" and although the attorney further testifies, at page 252 of the record, that the mistake was an error of his own in calculating the time. The remaining charges in respect to averments of his answer in the creditors' suit are no better supported when the entire testimony, instead of isolated extracts from it, is taken.

It is further charged that, so far from the default in the case in controversy being the result of inadvertence or unintentional ignorance, Harry King was a persistent defaulter in the payment of taxes (Brief for Webb, p. 141 *et seq.*), and that this is shown by his letter to Wiltsie of September 21, 1901, in which he states, "unfortunately, we have paid you quite a considerable amount of money in the past for tax sales." That this charge, also, is utterly without justification in the facts is entirely apparent upon any fair consideration of the testimony as a whole. While managing his father's mercantile business for some years before his death, it already appears from the testimony, quoted *supra*, that the condition of the father's estate at his decease, which comprised a large amount of real estate, was a surprise. At page 193 of the record, he states that he had occasionally made tax payments for his father during the lifetime of the latter, but that he, Harry King, had never to his knowledge had any transactions with Wiltsie during the lifetime of Harry King, Jr., nor did he think that the latter had had any. After his father's death, he and Job Barnard, Esq., now a justice of the supreme court of the District of Columbia, were appointed receivers of the father's estate, and in that capacity made the tax redemption payments with which he is charged, paying thirty arrearage tax bills between February and July of the year 1900. It does not appear, and it is believed not to be a fact, that any of these defaults in tax payments occurred

while the receivers were in charge of the property, or through acts of omission or commission on their part.

In connection with the attack on the witness Rogers at pp. 108-9 of the brief, it is suggested that *if* Harry King had been present in court during the hearing of the interlocutory appeal, or *if* he had read the Brief for Webb at that hearing, he might have learned of the existence of an authority in New York to the effect that application to the tax officers for the tax bills, and a statement by them that there were none due, would be proof of the absence of willful neglect; that an attempt to prove a matter of this kind by a "suspicious witness" must recoil upon him, and (p. 111) that the failure of the bill to mention these "pregnant facts" is "most significant." That the manager of a millinery and cloak store may fail to appreciate the legal value of even a more pregnant fact, and to communicate it to his counsel in time to admit of its being stated in the pleadings, is shown by the circumstance that perhaps the most legally important fact in this entire case, upon the question of the right to forfeit, namely, the fact that, notwithstanding the covenant in the lease that the taxes should be paid by the lessee, the lessor from the very beginning of the term took that matter out of his hands and assumed the task of looking after their payment herself is, also, not mentioned in the bill. If this circumstance were not incontestably proven by letters and by the endorsements of checks in the lessor's own handwriting this omission might equally have been characterized as "most significant."

That the attack upon the witness Rogers is without foundation is shown by the references to the testimony *supra* at pp. ——— of this brief (MSS., pp. 12-13). So far from the testimony of Miss Addison being that she necessarily gave him the tax bill, her testimony (Record, pp. 454-5) shows that her statement to this effect was based on the assumption that the bill had been delivered in May, instead of in July as the fact was, and that at other times than May (p. 454) it happened quite frequently that one clerk

would receive the request for the bill from a person who was to pay it and have the bill made out by another clerk, and that this may have been the case with the bill of which the witness Rogers testifies.

V.

The bill (Record, p. 6) contains an averment that the defendant Cohen, when on his journey to Rochester for the purpose of buying the tax title, was unable to sleep on account of his doubts as to the propriety of the course he was about to pursue. Under the agreement between counsel in the case, other than the counsel for Webb, complainant's testimony upon this point was not offered, and it was not proposed to refer in the brief or in argument to this averment. The reference to it at page 153 of the Brief for Webb perhaps renders it necessary to show that the averment was, at least, not without foundation. In his answer (Record, pages 46-7), Mr. Cohen concedes that, more than a month after the transaction, he admitted that the "propriety" of the action he was taking rendered him unable to sleep on the journey from Washington to Rochester to purchase the tax certificate, which fact, however, he explains in his testimony, was intended to apply to the business rather than to the moral expediency of the step about to be taken, and this notwithstanding the fact that he was about to invest only $500.00 in the purchase, that he knew the tax certificate was good in the hands of anyone who would become the holder of it and that "the very least that could happen would be that Harry King would have to pay back his expenses and outlays, and something for his trouble" (Record, p. 327).

VI.

THE REAR PARCELS.

At pages 83 and 186 of the brief of appellant Webb it is charged as a further ground why relief should not be granted that Harry King, or the appellee, did not discharge the duty of paying the taxes on what is referred to as the rear parcels or portions of the demised premises, comprising (Record, p. 124) about 133 square feet of back ground.

With respect to these, it will be seen by reference to the lease (Record, p. 13) that the demised premises are described in it simply as No. 715 Market Space, without any designation of the lot or parts of lots on which these premises are located. By comparing the testimony of the witness Warner (Record, pp. 120-3) with the communications from Mrs. Kennedy to Henry King, Jr. (p. 166 *et seq.*), it will further appear that, from the beginning of the term to the death of the original lessee, Mrs. Kennedy, herself paying the taxes on all of the parcels, notified him of the tax on sublot A only, affording neither him nor his family any grounds to suppose that No. 715 Market Space comprised any ground other than sublot A, or that the lessee was liable for taxes on any ground other than the said sublot. Such laches as there was was the laches of the lessor; and certainly it does not lie with her or her representative to claim the right to visit with the penalty of forfeiture an error for which her action and conduct were primarily and solely responsible.

If, following the example of the opposing brief, references to the brief below are permissible, the following extract from page 25 of the Brief for Webb at the final hearing in the Court of Appeals, it is submitted, presents the proper view as to the rear parcels:

"It is true that the original lessee did not pay taxes upon certain small portions of the rear demised premises which

in some way had become severed, so far as the tax bills were concerned, from sublot A which comprised almost the whole of these premises. Under all the circumstances of the case, however, counsel are unwilling to claim that this was such a breach of covenant on the part of the original lessee as would have justified a forfeiture of the lease as against him."

And the assignee of the lease, certainly, was under no higher or more rigorous duty in respect to the rear parcels than was the original lessee.

VII.

HARDSHIP AND DANGER OF COMPULSORY RETENTION OF A FAITHLESS SERVANT.

Notwithstanding the disclosure in the testimony of Mr. Webb that the harsh expressions and epithets applied to the appellee in the correspondence accompanying the effort to terminate her lease and evict her from the premises were "legal," only, and did not really proceed from any hostility, unfriendly feeling, want of confidence or unwillingness to make terms with her as readily as with the Kanns if she would take a shorter term and pay as much (Record, pp. 309, 316-17, 351, 354-5), the attempt is made in his brief, at pages 36, 56, to recur to those unreal or "legal" objections as though they could be really entitled to weight or consideration in this case, under the circumstances stated. That they are without substantial force in any case, will appear upon consideration of the fact that the tax paying dates are fixed by law, known to all property owners; that the protection of the latter consists in the possession of the receipted tax bills, and that there is no greater difficulty or hardship in seeing that the tenant delivers these at the tax payment dates than in seeing that the rent is paid at the rent instalment dates.

Some reference to certain of the points contained in the brief for appellants in No. 202 may, perhaps, be of service or convenience.

1. At page 23, the allegation that the appellee had complied with each and every of the terms of the lease with the single exception of the tax instalment for which sale was made is stated to be untrue, because certain other instalments were not paid until after they were due. The circumstances under which these taxes failed of prompt payment have been already pointed out in this brief, as well as in the record, and need not be here repeated. All of them had been fully paid, with the single exception specified, more than a year before this suit was instituted, vindicating the statements of the bill in this regard, except for purposes of verbal criticism only.

2. The effort, at pages 24, 57, and 59, to convict Harry King of stating that the default in payment of the taxes arose from the fact that he "had not charged his mind with it at all," is precisely the same, and is based upon the same incomplete extract from his testimony, as in the brief for the appellant in No. 203; and, as above pointed out, that extract must be read out of connection with his testimony upon the same subject, at page 170 of the record, in order to appear colorably open, even, to the construction contended for.

3. The bill, alleging at page 5 that the action of Cohen in going to Rochester on September 30 to purchase the tax title was "entirely acquiesced in by the said Webb, acting on behalf of the said Kennedy, no effort being made either by her or by him to prevent the acquisition of a title, colorable or otherwise, adverse to her and destructive of her own interests," is argued at pages 27-30 of the brief to be untrue, apparently upon the ground that there was no verbal acquiescence, but, on the contrary, a verbal dissent; the argument,

however, not going to the extent of attempting to deny that there was the kind of non-acquiescence thus charged by the bill. The latter further charging, at page 9 of the record, that the landlord and tenant proceeding of November 9 was instituted by Mrs. Kennedy under pressure and menace exerted upon her in the latter part of October by the Kanns, this, at pages 31-2 of the brief, is said to be contradictory of the prior charge of acquiescence on the former occasion; while, at pages 46-8 of the brief, it is denied that the Kanns offered any menace, and at pages 40-1 it is asserted that all the answers deny that any agreement ever existed to the effect that the Kanns would not enforce the tax title if Mrs. Kennedy would enforce the forfeiture, but would set it up against her if she should refuse to do so. While, concededly, these denials are contained in the answers, Mr. Webb's testimony at pages 291-2, 318, 319, that the Kanns offered to surrender the tax certificate and take a lease if the Kings were gotten rid of, that otherwise they would hold the tax title adversely and in hostility to Mrs. Kennedy, would possibly bring ejectment, and that she must take the consequences, that Mr. Webb regarded these representations as a "threat" and "acted accordingly," informing appellee's agent, Cahill, that it was "impossible to negotiate with him" because this could only be done "by fighting for the existence of the property, and he did not care to run that risk for this lease" (Record, p. 352), is without attempt at contradiction, or of any explanation which will reconcile the testimony with the denials in the answers thus referred to in the brief.

At pages 45-6 of the brief it is claimed that the declaration by appellee that she would not acquiesce in being ousted of her lease without an attempt to save her rights by resort to the courts, if the lessor should insist upon declining to accept her proposition to vacate the tax title, at her own cost and with indemnity against loss or danger from it, is to be put in the same category with the conduct of the Kanns in taking advantage of the information obtained from Mr. Webb in

regard to the tax title, acquiring it to be employed as a club over Mrs. Kennedy's head, and in actually using it, so obtained, for the purpose of coercing her into insistence upon the forfeiture, etc. The distinction, it is submitted, is too obvious to require comment.

4. Pages 32-3 are devoted to denials of the allegations in regard to information received by the appellee through Dr. Fry that Mrs. Kennedy had become willing to waive the forfeiture, and an *ex parte* affidavit of Dr. Fry in contradiction is quoted, with comments upon the omission of the complainant to call him as a witness for her. On the contrary, it is submitted, the production of Dr. Fry as a witness was rather within the power and province of the appellants, and this the record shows (pp. 434-5) they were challenged to do, but did not. That Mrs. Kennedy through Dr. Fry's intervention had become willing to waive the forfeiture if appellee would extinguish the tax title and secure her, and that she was driven from this position through the pressure and threats brought to bear upon her by the Kanns is admitted by the answers as summarized at page 7 of the brief for appellant in No. 203; while the allegation in question is in effect admitted in the Brief for Webb at pages 178-9, and in the Brief for Kanns at pages 134-5, in every substantial point except the immaterial particular that Dr. Fry communicated the fact to the complainant—how she learned the fact, so as to be able to allege it in her bill, otherwise than through him being in no way accounted for.

5. At page 16 of the Brief for the Kanns, it is alleged that they did no acts toward acquiring the premises in dispute until they had been informed that the lease had been forfeited, and that the lessee was to be evicted. If they received such information, it is quite clear that it was erroneous, since Mrs. Kennedy declined to forfeit the lease until after she could know where she was to get another tenant (Record,

pp. 94-5). Nor is the claim that the Kanns did no acts toward acquiring the property prior to the time stated, correct. Indeed, by the application of processes of argument far less insufficient than those resorted to in the opposing briefs for the purpose at attacking the original lessee, his son Harry King, Rogers and others, the claim could be most seriously questioned. Mr. Cohen had been for two years or more trying to get the King lease (Record, p. 406). In April or May, 1901, he renewed the attempt by negotiation with Harry King, telling him "that this might be the last time that he would ask him to sell the lease." His refusal was followed, in June of the same year, by an amendment to the creditors' suit charging that the lease could have been sold for $10,000 at the time of its assignment to the appellee (Record, p. 217), accompanied by an overture, in the same month, by the Kanns to Webb to take the store at an increased rental (Record, pp. 287-8). The creditors eventually submitted their case to hearing upon bill and answer, thus evidencing that the expected testimony as to the offer for the lease was not forthcoming. No proof or intimation that any one other than the Kanns desired or made overtures at any time for the premises is to be found in the testimony, and the only evidence that any offer was ever made for it, at any time, is that of Mr. Cohen at page 406, denied in every particular by Mr. King (Record, p. 476). If a question of credibility between these two witnesses must result, Mr. King is uncontradicted in any point except by Mr. Cohen, while the latter is contradicted in material particulars not only by Mr. King, but by Mr. Wiltsie, Miss Watson and Mr. Newton, and occupies a position which has certainly nothing to gain by comparison with that of Mr. King, in any phase of the case.

6. At page 17 of the brief in No. 202 the decree appealed from is complained of as having compelled a litigation for more than four years, and, at pages 62-3, that no right ex-

isted to force the complainant's title into jeopardy by the suit. This, if true, could interpose no ground for reversal in this court, whose affirmance of the decree below will effectually terminate such "risk;" and, in addition, the position taken is irreconcilably at variance with the statement of the brief in No. 202, at page 183, that by Mrs. Kennedy's acceptance of the compromise offer of the Kanns "the tax title was gotten out of the way," and that Mr. Webb accordingly thereafter "consistently acted with the Kanns."

At page 20 of the brief the claim is made that the tax sale, "whether valid or invalid, had become irredeemable by lapse of time." How an invalid tax sale becomes irredeemable is not shown. If invalid, even the money paid under it by the purchaser must be refunded to him, as is pointed out at page 93 of the brief.

Under the facts of the case as established by the pleadings and the evidence, and under the authorities, it is respectfully submitted:

1. That the tax title is clearly invalid and presents no obstacle to relief.

2. That, even if valid, the circumstances attending its purchase, and the purposes of its acquisition and for which it has been attempted to be used, are such as to prevent it being allowed to stand in the way of relief in a court of equity.

3. That the bill makes no persons parties who are not interested in each of the two questions it presents, namely, whether the tax title is valid, and whether the forfeiture shall be relieved against and the lease continued; and for this reason alone, as well as for the others stated *supra*, it is not multifarious.

4. That the courts below did not exceed their jurisdiction, either in principle or under the great weight of authority, in

holding that breach of a covenant to pay taxes may be relieved against in equity where there has been no tax sale, valid for any purpose, and where, therefore, the taxes may still be paid and the *status quo* fully restored.

5. That even if, under ordinary circumstances, the law were otherwise, as to the general power to relieve against forfeiture for breach of such a covenant, the evidence warranted the court's finding in fact that the default in the case at bar was largely, if not principally, occasioned by the lessor's own inadvertence, oversight or negligence, and its finding in law that a default, so occasioned, should not be taken advantage of for the sole purpose, confessed on the record, of getting rid of the unexpired term and of obtaining a higher rent.

6. That in imposing one-half of the costs of the case upon appellants in No. 202, in view of the extent and of the character of their responsibility for the litigation, and in refusing costs as between solicitor and client to appellant in No. 203, incurred in attempting to defeat the appellee of her lease under the circumstances, and for the purposes stated above, and in "acting consistently with the Kanns" in their course in the matter throughout the litigation, and confessedly for two months before, the courts below were well within their judicial discretion with respect to the question of costs.

7. That there is no error in the decree appealed from, and that it should be affirmed.

J. J. DARLINGTON,
LEON TOBRINER,
Solicitors for Appellee.

Supreme Court of the United States.

Nos. 16 and 17.—October Term, 1906.

Louis Kann, Sigmund Kann and Myer Cohen, Appellants,
vs.
Caroline King.

Henry Randall Webb, Executor, etc., Appellants,
vs.
Caroline King.

} Appeals from the Court of Appeals for the District of Columbia.

[January 7, 1907.]

Mr. Justice White delivered the opinion of the Court.

These appeals are from a decree of the Court of Appeals of the District of Columbia, which adjudged that a tax sale of certain real estate in the District was void, and which relieved the lessee of the premises from a threatened forfeiture of the lease, asserted to have resulted from the failure of the tenant to pay the taxes to enforce which the tax sale was made. The complainant in the original bill was Caroline A. King, the lessee of the premises, and the defendants were Marianne A. B. Kennedy (the lessor) and Louis Kann, Sigmund Kann and Myer Cohen, whom it was alleged claimed to be either the equitable or legal owners of the tax title in question. The defendant Kennedy died the day the bill was filed, and Henry Randall Webb, as her executor, and Maria G. Dewey, as her heir at law, were substituted as defendants.

The lessor prosecuted an appeal from an order granting an injunction *pendente lite*, restraining him, among other things, from prosecuting landlord and tenant proceedings, based upon a right of re-entry arising from the alleged forfeiture caused by the nonpayment of taxes and tax sale referred to in the bill. The Court of Appeals on the face of the bill sustained the order of injunction. (21 D. C. App. 141.) The cause having been put at issue by separate answers asserting the right of the lessor to forfeit and the right of the holders of the tax title was tried on the merits and was decided in favor of the complainant. It was taken to the Court of Appeals on behalf of all the defendants except Mrs. Dewey, and the decree of the lower court, adjudging the tax sale to be void and relieving from the alleged forfeiture, was affirmed. (D. C. App. .)

The origin of the controversy and the facts as to which there are no dispute are as follows:

The property in controversy, No. 715 Market Space, in the city of Washington, was owned by and assessed for taxation in the name of Maria T. Gillis at the time of her death, intestate, in 1871. Marianne A. B. Kennedy, as the heir at law of Mrs. Gillis, took possession of the property as owner, without any administration upon the estate of Mrs. Gillis. After the death of Mrs. Gillis, continuously up to the making of the tax sale hereafter referred to, the property remained on the public records and continued to be assessed in the name of Mrs. Gillis, except that a small portion of the rear end of the premises was, at a time not shown, but prior to the tax sale before referred to, assessed for taxation in the name of Mrs. Kennedy and her husband.

In 1890, Mrs. Kennedy leased in writing the premises to Henry King, Jr., the husband of complainant, for use as a fancy dry goods store, and by several extensions the period of expiration of this lease came to be October 1, 1908. By the lease the lessee, his executors and administrators or assigns, were bound, "during the continuance and until the end and determination of the said term, for which the said premises are demised, to pay or cause to be paid in each and every year thereof the taxes, general and special, of every character and description, assessed against and levied upon the said premises by the authorities of the general or local government." The right to terminate the lease and to re-enter upon the breach of any of the conditions was stipulated. When the lease was made King, the lessee, was engaged in the dry goods business in a store on Seventh street, not far from the Market Space store. Under the lease he entered into possession of the Market Space store and carried on, in addition, business there until his death on August 18, 1897. Sanctioned by an order of the Probate Court, an assignment of the lease covering the store on Market Space was made to Caroline A. King, the widow. The business was thereafter conducted for a time solely in her name. She did not, however, actively supervise it. Her elder son, Henry King, Jr., who had been, during the latter years of his father's life, in general charge of the business for his father, remained in that capacity, after the death of the father, as the representative of his mother, assisted at the Market Space store, in a subordinate capacity, by a brother, Joseph King, who, during the father's life, had also, in a subordinate capacity, been engaged in business at that place. From the making of the lease in 1890 to the death of King in 1897 it was the habit of Mrs. Kennedy, when the tax on the Market Space store was about to become payable, to request the lessee to send her a check for the amount of the tax, and on the receipt thereof the tax was paid either by Mrs. Kennedy or her agent. This course was not, however, followed, after the death of King. The first installment of taxes which fell due in November, 1897, soon after the death of King, was directly discharged by Mrs. King, who took and retained the receipt. This

was done at the request of Mrs. Kennedy, who called at the Market Space store about Christmas, 1897, and asked that the tax be paid. From that time no request was made by the lessor to the tenant, as the taxes fell due, to send her the money to enable her to pay them, nor is it shown that any express demands were made that the tenant pay the taxes directly. From the time of the payment by the tenant, near the close of 1897, of the first installment of taxes which fell due after the death of her husband, until the summer of 1900, a period of more than two and a-half years, no taxes whatever were paid upon the leased premises. In the interval the following taxes became overdue:

Second installment of tax for 1898, due in May, 1898;
First installment of tax for 1899, due in November, 1898;
Second installment of tax for 1899, due in May, 1899;
First installment of tax for 1900, due in November, 1899; and,
Second installment of tax for 1900, due in May, 1900.

On July 24, 1900, the two installments of the tax for 1900, due in November, 1899, and May, 1900, with accrued penalties, were paid by the tenant under the following circumstances: As testified by Harry King, he being concerned over past due taxes, owing on a large number of tracts of real estate owned by the estate of his father, it "occurred" to him to have the "bookkeeper go down to the tax office and inquire for the tax bills of 715 Market Space." The bookkeeper went and subsequently reported that the two installments for 1900 were due, and Harry King paid them. The nature of the inquiry made by the bookkeeper at the tax office, and what occurred, is the subject of controversy, and we pretermit its consideration. Nearly a year after, in May, 1901, the two installments of taxes for 1899, due in November, 1898, and May, 1899, with interest and penalties, along with the taxes for 1901, were paid by the tenant. The payment of the 1899 taxes was by way of redemption of a sale of the property for such taxes made on April 12, 1900. There is no doubt that the payment of the arrears for 1899 was a result of the visit by the bookkeeper to the tax office. It will be observed that the payments which were made in 1900 and 1901, of taxes which were in arrears, did not embrace the second installment of the tax of 1898, due in May, 1898. To enforce that installment a sale had been made in April, 1899, and a certificate was issued to the purchaser a few days thereafter, which was subject to a right of redemption during a period of two years. In other words, when the installments of taxes which were in arrears were paid on July 24, 1900, the property had been sold for the last half of the tax of 1898, and when the payment was made in 1901 of the arrears for 1899 the period for redemption had elapsed.

On July 25, 1901, Mrs. King received a letter sent from Rochester, New York, by one Wiltsie, stating that he had boughf the property in April, 1899, at a tax sale to enforce the tax for the second half of the year 1898, and that he was entitled to a deed of the property, but would surrender the tax certificate if immediate payment was made of the amount of his, Wiltsie's, advance, viz., $143.93, together with the statutory interest at the rate of fifteen per cent, and a charge for releasing to be agreed upon. Harry King, Jr., replied to this letter on July 30, 1901, and asked to be informed of the charge for redemption. Wiltsie answered on August 1, 1901, calculating the statutory interest at $50.38, and naming $100 as his fee or charge for releasing. To this letter reply was made that Harry King was out of town, and that on his return the letter of Wiltsie would be laid before him. On September 17, 1901, Wiltsie wrote King, and called attention to the fact that he had not heard from him, and requested to be informed by return mail when the matter would have attention. To this King replied, objecting to the charge of $100 for releasing, and stated that in his opinion $50 would be an equitable charge. The letter concluded the follows:

"Unfortunately we have paid you quite a considerable amount of money in the past for tax sales. We are not interested in this piece of property in any way except as tenant, as we are not the owners or the mortgagees. If it should meet with your approval send us a bill and we will send check."

It was replied on September 24, 1901, that if the matter was attended to promptly $75 would be accepted for the release certificate, and that the papers had been sent to the Central National Bank of Washington where, on payment of $272.90, they would be delivered up.

Neither Mrs. King nor her representatives, after learning in July of the sale of the property and of the outstanding tax title, gave any notice of that fact to the lessor, nor did they apparently concern themselves further about the matter, until the purchase of the certificate from Wiltsie, as hereafter stated by Cohen, one of the defendants.

Both the Kann defendants carried on business on Market Space, having stores on each side of the property leased to King, and the situation was therefore such that the possession of that property was particularly advantageous to the Kanns. Indeed, they had at some previous time stated to Webb, the attorney of the lessor, that if they could obtain a long lease of the premises they would be willing to pay a rent much in advance of that paid by Mrs. King. Some time in September, 1901, one Knight called upon the Kanns and informed them that the property at 715 Market Space had been sold for taxes. They referred him to Webb, the attorney of the lessor. Knight called upon Webb, said to him that Wiltsie had bought the property at the tax sale, and solicited employment to set

aside the sale. Webb on the next day made inquiry, and discovered the fact of the sale and the outstanding certificate and the lapse of the period of redemption. He informed the lessor of the fact and of her right to forfeit the lease. Mrs. Kennedy, who was advanced in age, being nearly eighty years old, was perturbed, and, in a letter to Webb, expressed solicitude as to obtaining a new tenant in case the lease of Mrs. King was forfeited. As a result of the conferences and the correspondence between Mrs. Kennedy and her counsel, the latter called on Cohen, another defendant, who was the attorney of the Kanns, and desired to know whether the Kanns were yet willing to lease at an increased rent, and was informed they were. Shortly after Cohen advised the Kanns to purchase the Wiltsie tax certificate, and upon their giving him authority to use his discretion in the matter he determined to go at once to Rochester to accomplish that purpose. He communicated his intentions to Webb, who endeavored to dissuade him. Cohen went to Rochester. The papers which had been sent to Washington in consequence of the correspondence between Wiltsie and King were returned to Rochester. Cohen bought the certificate, took an assignment of the same on October, 1901, and, returning to Washington procured a tax deed for the property from the Commissioners of the District, which was duly recorded. Thereafter Mrs. Kennedy notified Mrs. King of her intention to re-enter because of the forfeiture of the lease resulting from the sale of the property for the nonpayment of taxes. Harry King then called at the bank to take up the certificate, and found that it had been returned to Wiltsie. Negotiations ensued between Mrs. King and Mrs. Kennedy, looking to a compromise of the matter, and a letter was written by the counsel of Mrs. King to Mrs. Kennedy, asking to be permitted to use her name in proceedings to be brought to cancel the tax sale. This was declined. At all times Mrs. King insisted upon her right to continue in possession under the lease despite the default. The Kanns notified Mrs. Kennedy that they were the real holders of the tax title, and would attempt to enforce their rights under it unless a lease of the property was made to them at the previously suggested increased rental. The counsel of Mrs. Kennedy, Webb, advised making such a lease. Placed between the threatened assertion by the Kanns of the tax title, unless they obtained a lease, and the insistance of Mrs. King that she was entitled to retain the property under her lease, Mrs. Kennedy wavered. The result was a letter addressed by Webb, the counsel for Mrs. Kennedy, to the counsel for Mrs. King, submitting a proposition of compromise, which was in substance that Mrs. Kennedy would waive the forefeiture upon condition that Mrs. King promptly commenced and prosecuted proceedings to have the tax deed to Cohen declared a nullity or defend against any claim under the tax title, and upon the further condition that Mrs. King furnish a bond with sufficient surety to

pay the sum of seventy thousand dollars in the event that the tax title was held to be valid. Counsel for Mrs. King in writing declined this offer. The letter doing this made no counter proposition, but referred to and did not expressly withdraw the previous offer of Mrs. King, if she were allowed the use of Mrs. Kennedy's name, to conduct proceedings to vacate the tax title. In addition the letter, which was quite lengthy, expressly stated the opinion of the counsel of Mrs. King to be that the tax title was void and could be set aside. It insisted that Mrs. King would be relieved by a court of equity from the forfeiture alleged to have resulted from her inadvertent omission to pay the tax, and besides stated various grounds, which, it was deemed, placed Mrs. Kennedy in a position where she could not, as against Mrs. King, ask to be protected against the risk, if any, of the outstanding tax title held by the Kanns. These grounds were, in substance, that the tax certificate had been bought by the Kanns at the instance of the counsel of Mrs. Kennedy, for the purpose of making sure of a forfeiture of Mrs. King's rights, and with the knowledge that negotiations were pending between Mrs. King and Wiltsie, and for the purpose of forestalling the acquisition by Mrs. King of the tax certificate.

The negotiations having failed, Mrs. Kennedy commenced landlord and tenant proceedings to recover possession. Before the time set for the trial of the proceedings Mrs. King commenced this suit, which, as we at the outset, stated sought to have the tax title declared void, to have complainant relieved from the forefeiture, and for an injunction restraining the prosecution of a landlord and tenant proceeding.

That a court of equity, even in the absence of special circumstances of fraud, accident or mistake, may relieve against a forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee, is elementary. (*Sheets* v. *Shelden*, 7 Wall. 415.) But that principle cannot control this case, even if it be conceded, for the sake of argument, that it applies to collateral covenants in leases, such as the obligation to repair, to insure, (and even to pay taxes,) said in the Sheets case to be settled in England adversely to such right, but to be an open question in this country, and as to which there may be differences of opinion in State courts of last resort. (*Noyes* v. *Anderson*, 124 N. Y. 175; *Giles* v. *Austin*, 62 Ib. 491; *Gordon* v. *Richardson*, 185 Mass. 492; *Lundin* v. *Schoeffel*, 167 Ib. 465; *Mactier* v. *Osborn*, 146 Ib. 399; *Tibbetts* v. *Cate*, 66 N. H. 550; *Bacon* v. *Park*, 19 Utah, 46.) We say this, because the general principle, as declared in the Sheets case, rests upon the ground that "the rent is the object of the parties and the forfeiture only an incident intended to secure its payment, that the measure of damages is fixed and certain, and that when the principal and interest are paid the compensation is complete." When the foundation upon which the doctrine is based is borne in mind it becomes

apparent that it affords no ground for the contention that it is applicable to a case where the failure to perform a covenant to pay taxes has led to a tax sale, ripening into a *prima facia* irredeemable title held adversely to the lessor. In other words, the doctrine lends no support to the proposition that a court of equity can require an owner to risk the loss of his property by compelling him to engage in a contest involving the validity of an irredeemable tax sale, for the purpose of endowing the tenant with the right, if the tax title be held invalid, to pay the taxes and thus be relieved of a forfeiture. To extend the principle to such a degree would be destructive of rights of property, since it would subject every one who made a lease of his property, containing a covenant by the lessee to pay taxes to the hazard of the loss of his title, if only the tenant chose to violate the covenant, and thus give rise to the coming into existence of a tax title, *prima facie* valid and irredeemable in character. And the force of these considerations is not avoided by the reasoning which led the court below to its conclusion or by the arguments at bar advanced to support that conclusion.

Thus, the court, in its opinion, considering the paramount issue to be the validity of the tax sale, first disposed of that question, and, concluding that the sale was void, proceeded to determine its power to grant relief from the forfeiture, upon the hypothesis that there never had been a tax sale, that the taxes were still due, and could be paid, and that the tenant was willing to pay them. But thus to contemplate the controversy was to assume the very question for decision, that is, the power of a court of equity, in order to relieve from a forfeiture, to endow a tenant with the right to create, at the risk of the owner, a primary controversy, viz., to compel the owner against his will to jeopardize his title by testing the validity of the irredeemable tax sale, a hazard which the owner was desirous of avoiding. The paramount issue was not, as assumed, the invalidity of the tax sale as a mere abstract question, but, we repeat, was the right of the tenant to invoke at the hands of the court a determination of that question at the risk of the owner. And this view is not changed by saying that the decision at the instance of the tenant as to the validity of an irredeemable tax title, held by a third person, was an incident to the right of the tenant to be relieved from the forfeiture, for to so say is but to destroy the foundation upon which the right to relief from the forfeiture rested, that is, the ability of the tenant when applying for relief to make complete compensation. And the misconception of the general doctrine just pointed out pervades the argument at bar of the appellee. Thus while no authority is referred to sustaining the right of a tenant to test the validity of an outstanding *prima facie* irredeemable tax deed, caused to exist by the default of the tenant, the ultimate result of the contentions is to assume that principle as established and to predicate rights

upon that hypothesis. In other words, in substance, by a *petitio principii*, the propositions urged treat the outstanding tax title as void and proceeded to demonstrate the right to relief under that assumption.

There being, then, no foundation for the contention that it was within the ordinary power of a court of equity to relieve from the forfeiture, we come to consider whether the case as made by the record is brought within the general authority of a court of equity to relieve in cases of fraud, accident or mistake. We put out of view, for ulterior consideration, the question of fraud, and therefore presently examine only the contentions as to the existence of the elements of accident or mistake. In considering this subject two propositions are obvious: First, where the forfeiture from which relief is sought has been occasioned by the gross negligence of the person claiming to be relieved the default so occasioned is not one brought about by accident or mistake; and, second, that even where accident or mistake has been shown, especially in the absence of culpability or fraud on the part of the other party, a court of equity will not grant relief from the forfeiture, unless it can be done with justice to that party.

Referring to its opinion on the appeal from the order granting an injunction *pendente lite*, and in effect reiterating the view therein expressed, that the averments of the bill justified the relief prayed, the court in its opinion on the final hearing said:

"But the testimony makes it more plain than even the allegations of the bill of complaint did, that she is is entitled to the relief which she asks. The testimony shows quite conclusively that, while the lease required the annual taxes on the property to be paid by the lessee, yet the invariable custom of the lessor down to the time of the default had been to demand and receive the amount of the taxes from the lessee, and to pay the taxes herself by her own agents. For the taxes of the second half of the year 1898, in connection with which the default occurred, the lessor failed for some reason to make the usual demand for the money wherewith to pay the taxes; and the lessee was in the midst of financial trouble and distress caused by the recent death of her husband, who had been the lessee down to the time of his death. The record shows to us quite plainly that the default of the lessee was excusable under the circumstances; and that no harm would be done to any one by her relief from the nominal forfeiture which she has incurred."

By this reasoning it was assumed the case was brought within the grounds of relief for accident or mistake upon two inferences, both treated as alleged in the bill and established by the testimony: first, the prior practice of the lessor in calling upon the tenant to hand her the money to pay the taxes and then herself paying them; and second, the failure of the lessee, after this practice was discontinued, to call to mind that the tax was due and payable, owing to her disturbed state of mind at that particular time. In the argument at bar reliance is principally rested upon the

first of these grounds, and indeed it is insisted that the testimony goes much further than implied by the court below, and demonstrates that the conduct of the lessor was such as to mislead the lessee, and thereby estop the former from asserting the forfeiture.

Let us consider separately the two grounds: First, accident or mistake as engendered by the course of dealing of the lessor, and, second, accident or mistake arising from oversight, the alleged result of the particular circumstances surrounding the tenant at the time of the failure to pay the taxes. As to the first ground it would seem to be an afterthought, since it was not suggested in the correspondence between the parties immediately preceding the litigation that Mrs. Kennedy by her conduct had in anywise led to the default of the tenant. To the contrary, that view was excluded, for in the letter written to Mrs. Kennedy, dated October 8, 1901, asking authority to use her name in proceedings to be brought by the tenant to cancel the tax sale, the attorneys of Mrs. King said:

"We assume that you are aware that your tenant has always paid the taxes upon the demised premises, and the failure to pay the one made the basis of the notice was an oversight, caused by the death of Mr. Henry King, Jr., which was being remedied at the time your notice was received."

And although it would seem that the court below assumed to the contrary, the fact is the bill contained no averment justifying the default in paying, upon the theory that it had been induced by the conduct of the lessor. To the reverse it was specifically stated in the fifth paragraph of the bill that the alleged single default in the payment of taxes arose "wholly through oversight and inadvertence," without in anywise charging that the conduct of Mrs. Kennedy was in whole or in part the cause of the oversight or inadvertence. Besides, in the eleventh paragraph of the bill, explicit reference was made to the letter to which we have just above referred, and it was alleged that by its terms Mrs. Kennedy was notified "that the failure to pay the taxes was simply an oversight, which was being remedied at the time the notice of refusal to accept the rent was received." True it is that the testimony shows that prior to the death of Henry King, in August, 1897, the lessor was in the habit of calling upon the tenant for the amount required to pay the tax then due or about to become due, in order that she might herself pay them. True also is it that Henry King, in testifying, made statements from which the inference can be deduced that in conducting the business for his mother, after the assignment of the lease subsequent to the death of his father, he relied upon a continuance of this practice. But it must be borne in mind these statements were made after the death of Mrs. Kennedy, who died on the day the bill was filed, and their inaccuracy is, we think, conclusively shown by the mode of dealing following the assignment of the lease and the conduct of the tenant in respect to the

matter of taxes. The very first payment of taxes made after the death of Henry King was made by the tenant herself, paying the taxes at the request of Mrs. Kennedy and retaining the receipt. Nearly three years of default followed, without any payment of taxes by the tenant whatever and without any inquiry being made by the tenant on the subject. When in July, 1900, the two defaulting installments of the tax for 1900 were paid by the tenant they were not paid at the instance of Mrs. Kennedy, or because of any request upon her part, but because it "occurred" to the tenant to do so. When they were paid the payment embraced interest and penalties, for which the tenant could not have deemed herself responsible if the course of dealing asserted had been relied upon. Despite this fact, no proof whatever was made of any notice to Mrs. Kennedy of the fact or of any claim being made against her in the premises. And the same thing is true as to the payments made in May, 1901, of the current taxes and some of the overdue installments. Besides, when these payments were made the property had been sold for the overdue installments, but was yet subject to redemption, and the statute interest of fifteen per cent was paid by the tenant without any intimation of a claim of any character against the lessor. Indeed, the conduct of the tenant in respect to the very tax for which a forfeiture was asserted is absolutely inconsistent with the theory that she deemed that her landlord was the cause of the default, for when notice was received by the tenant from the purchaser at the tax sale of the outstanding irredeemable tax certificate more than two months and a half elapsed before the purchase of the certificate by Cohen, and no complaint was made to the landlord that she had neglected to demand payment of the tax, and that in consequence the default and loss was occasioned, but a negotiation was opened to purchase the outstanding title for the account of the tenant alone. When this line of conduct is considered in connection with the fact, already stated, the conclusion is inevitable that the suggestion that the conduct of the landlord had induced the failure to pay, first made after the death of Mrs. Kennedy, is without foundation.

And the facts which we have just stated also render it impossible to conclude that the nonpayment of the tax was due to a mere temporary oversight, and not to gross negligence. How can an inference of temporary oversight be possible when the long period of the failure by the tenant to pay any tax whatever is borne in mind, and when we also consider the delay of more than two months and a half which took place after knowledge was conveyed, by the letter of Wiltsie, of the outstanding irredeemable tax certificate?

The fact that the tenant was a merchant, and of necessity kept mercantile books, is significant. The mind cannot conceive of adequate entries

being made of the taxes which were belatedly paid, which would not have at once suggested those which were unpaid. The inference fairly deducible from the letter to Wiltsie—"Unfortunately we have paid you quite a considerable amount of money in the past for tax sales"—adds cogency to the irresistible inferences as to negligence.

And even if the foregoing consideration which establish the absence of accident or mistake and demonstrate the presence of gross negligence are put out of mind, and accident or mistake be assumed, for the sake of the argument nevertheless, under the circumstances of the case, a court of equity could not give relief. This follows, since the relief sought could not be afforded without subjecting the lessor to the peril of contesting the validity of the outstanding *prima facie* irredeemable tax title.

We come to the question which we hitherto put aside for final consderation, viz., the alleged fraud. It, in any event, only involves a consideration of what took place with regard to the purchase of the tax certificate by Cohen as the agent of the Kanns, and the circumstances surrounding and connected with that purchase and the use made of the certificate. Concerning these matters the court below said:

"We find no evidence whatever in the record of any fraud or wrongdoing perpetrated by any one concerned. We only find the evidence of a situation created by a keen commercial rivalry and shrewd management, wholly untainted by wrongdoing, but still a situation from which injury is threatened to the complainant's rights of property, and against which she is entitled to be relieved. For that there was an arrangement between the defendants whereby the tax certificate was to be used to oust the complainant from the property, we think is too plain to be reasonably questioned. There was, undoubtedly, a concurrence of effort for that purpose, perhaps no formal combination or preconcerted action. But it matters not what we call it. The undoubted fact is there was co-operation between the defendants to use the tax certificate to the detriment of the complainant's rights; and there being such co-operation, the defense of multifariousness cannot prevail. The one purpose of the bill is to relieve the complainant from the effect of this tax certificate and of the tax title based upon it."

For the reason that we agree with the finding that there is no evidence whatever of any fraud or wrongdoing by any one concerned, we are constrained to disagree with the conclusion that the complainant was entitled to relief. We say this, because we are of opinion that the relief awarded could only have been justified upon the finding that there was fraud and wrongdoing. We so conclude, because if it be accepted that there was an agreement and combination as to the certificate, entirely free from every element of fraud or wrongdoing, we fail to perceive how an agreement of that character afforded ground for granting the relief which was given. But disregarding mere forms of expression and assuming that the general

finding that there was no fraud or wrongdoing was intended to be limited to intentional as distinguished from constructive fraud or wrongdoing, let us briefly review the facts concerning the acquisition and use made of the certificate, in order to fix whether such a finding is at all sustained by the record. Although we think it immaterial, as there was no evidence whatever tending to show that the lessor or her attorney procured the purchase of the certificate by Cohen, that subject may be put out of view. The irredeemable tax certificate was in the hands of and belonged to Wiltsie. He notified the tenant that he held it more than two months and a half before the purchase by Cohen, and proffered his willingness to assign it to the tenant. As shown by the undisputed facts which we have stated, with indifference both to her own interest and the interest of the landlord, the tenant neither acted for herself by accepting the offer nor gave any notification whatever to the landlord on the subject. Cohen, as the agent of the Kanns, learned of the existence of the irredeemable tax sale and of the person who held the certificate. He purchased it by the authority of and for the benefit of his principals, the Kanns. By the express terms of the statute under which the certificate was issued it was assignable. Granting that the purchase was made in order to aid the Kanns in obtaining a lease of the property, in the absence of any legal duty owing by them to the tenant, we fail to perceive how the motive of Cohen or his principals could operate to make the otherwise lawful action constructively wrongful. The tenant, by whose negligent default the sale of the property had been occasioned, certainly had no exclusive pre-emptive right to the purchase of the certificate, which would operate to render its purchase by any one else in his own interest void. After the purchase of the certificate by Cohen, what was the position of the landlord? On the one hand confronted by the assertion of the tenant that the outstanding tax title was void, that she had a right to be relieved from the forfeiture caused by the nonpayment of the tax, and was entitled to continue in possession under the lease, and on the other with an offer on the part of the holder of the tax title to quitclaim the same, and thus avoid testing its validity, if only a lease was made which would be advantageous. When it is again borne in mind that this situation was brought about by the neglect of the tenant to perform his covenant to pay the taxes, and by his procrastination in respect to acquiring the tax certificate which had been previously offered to him, we can conceive of no principle of equity preventing the landlord from taking a course not forbidden by law which was not only most conducive to her own interest, but which besides obviated the danger of submitting her title to a contest concerning the validity of a tax sale. But if an equitable principle could be conceived of which prevented the landlord from so acting under the circumstances stated, that principle would

be inapplicable to the case before us, when one of the undisputed facts to which we have already called attention is considered. That fact is this: Before the landlord irrevocably determined to avail of the forfeiture and thus avoid the risk to herself concerning the outstanding tax title, she offered to condone the forfeiture, provided the tenant commenced proceedings to have the outstanding tax title declared invalid, and also secured the landlord from loss in the event that such tax title should be sustained, which offer was declined, on grounds substantially asserting that the risk resulting from the default of the tenant should be borne by the owner and not by the tenant.

The decree of the court below is reversed and the cause remanded with instructions to dismiss the bill for want of equity.

Reversed.

The CHIEF JUSTICE and Mr. Justice HARLAN dissent.

True copy.

Test:

Clerk Supreme Court U. S.